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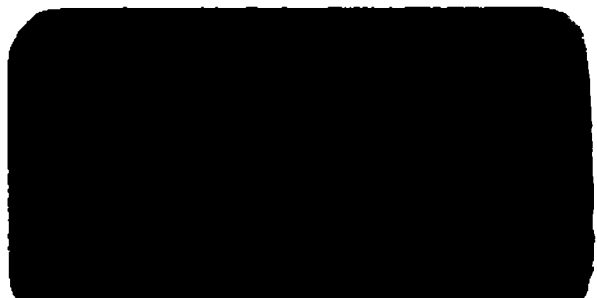
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THE LAW
OF
COMBINATIONS

EMBRACING

**MONOPOLIES, TRUSTS, AND COMBINATIONS OF
LABOR AND CAPITAL; CONSPIRACY, AND
CONTRACTS IN RESTRAINT OF TRADE**

TOGETHER WITH

FEDERAL AND STATE ANTI-TRUST LEGISLATION

AND THE

**INCORPORATION LAWS OF NEW JERSEY,
WEST VIRGINIA AND DELAWARE**

BY

ARTHUR J. EDDY

OF THE CHICAGO BAR

VOLUME I

**CHICAGO
CALLAGHAN AND COMPANY
1901**

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**STATE JOURNAL PRINTING COMPANY,
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TO HON. SAMUEL E. WILLIAMSON,

General Counsel New York Central & Hudson River Railroad.

My Dear Judge:

Without committing you to any of the ordinary or extraordinary notions herein contained, permit me to inscribe this book to you in recognition of your devotion and loyalty to the profession you so highly honor, and as a mark of personal esteem and friendship.

ARTHUR JEROME EDDY,

The Temple, November 5, 1900.

PREFATORY NOTE

This work is the outgrowth of many disappointments at not finding readily at hand, in convenient form, the cases and authorities bearing upon combinations. What was at first intended to be a quick but exhaustive compilation of authorities for personal use has become two volumes of case, comment and theory. It is needless to say if the book were rewritten it could be condensed and improved, though possibly the process of condensation might eliminate matter most useful to the busy lawyer.

The development of large combinations has been so rapid within the past few years that courts and legislatures have intervened to curb what seemed to them a dangerous tendency. The result is a heterogeneous mass of diverse laws and conflicting decisions which defy reduction. It is therefore necessary to give these laws and decisions somewhat in detail so their scope and bearing may be fully appreciated. The effort has been made to give all the law in such form as to obviate the necessity of constant reference to original sources. If this attempt seems to have unduly extended the work, it is because neither laws nor decisions can be adequately covered by general propositions.

Where combinations embrace corporations of and properties situated in different states it is essential to know the laws and decisions of such states, and also the bearing, if any, of the federal act and federal cases. To furnish this information in convenient form is one of the objects of this book; at the same time an attempt has been made to develop underlying principles and formulate so far as possible general

propositions,—in short, to not only state what the law is, but ascertain, if possible, what it should be. Progress is a procession of facts followed by theories; in the long run the two harmonize, and what the law should be it will be, but, it must be confessed, at the present time the lack of harmony is only too apparent. Combination as an economic factor in the industrial and commercial world is a fact with which courts and legislatures may struggle, and struggle in vain, until they frankly recognize that, like all other conditions, it is a result of evolution to be conserved, regulated and made use of, but not suppressed. Since the large combinations of recent years differ only in degree from the smaller combinations familiar to the common law, the principles of the common law broadly and intelligently applied are quite sufficient to meet the exigencies of the present situation. The common law itself is a noble development, and as such can more successfully deal with economic conditions, which are also the results of evolution, than laws which are the arbitrary and frequently the thoughtless edicts of man. It is much easier to enact a new law than to apply an old, but the latter will be found virile and effective where the former is either impotent or mischievous.

In a preface it is customary for the author to confess the faults and errors his book contains; but why discount the labor of the critic who discovers all things? Errors are recognized while virtues are yet a long way off; it would seem more reasonable to hasten the introduction of the latter, leaving the former to shift for themselves. That the errors herein are not more numerous is due in no small degree to Mr. Charles S. Williston of the Chicago bar, who has verified the citations and prepared the table of cases, and to Mr. Fred W. Arthur of the Madison (Wis.) bar, who with Mr. Williston has carefully read the proofs and made many valuable suggestions.

A. J. E.

THE TEMPLE, CHICAGO, November 5, 1900.

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THE LAW OF COMBINATIONS.

PART I.

MONOPOLIES.

CHAPTER 1.

IN ENGLAND AND AMERICA.

- §§ 1-3. Monopolies defined.
- 4-5. History of monopolies.
- 6, 7. Monopolies in England.
- 8. Legality of monopolies.
- 9. Incidents of monopolies.
- 10, 11. Statute of James I. and English law.
- 12-14. American comment.
- 15. Common law and American law.
- 16. Federal constitution and patents.
- 17. Powers of state legislatures and municipalities.
- 18. Powers of municipalities strictly limited.
- 19. Rule governing construction of grants of exclusive privileges.
- 20. Exclusive right to lay gas-pipes in streets.
- 21. Right to regulate use of franchise.
- 22. Exclusive right to maintain water-works.
- 23. Exclusive rights concerning highways and bridges.
- 24. A valid grant of exclusive privileges cannot be impaired by subsequent legislation.
- 25. Conflict among the authorities.
- 26. Some general propositions.
- 27. The essence of monopoly.
- 28. The law syllogistically stated.
- 29. Elements essential to a monopoly.
- 30-32. Indiscriminate use of term "monopoly."
- 33. Few monopolies in true sense of term.
- 34. Tendency toward greater freedom of contract.
- 35. Certain reactionary decisions.

§ 1. **Definition of monopoly.**—A monopoly is a license or privilege allowed by the sovereign for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.¹

§ 2. Lord Coke's definition is, "an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of every thing, whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade."²

§ 3. In Hawkins' Pleas of the Crown the following definition is found: "A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of any thing, whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before. Monopoly differs from ingrossing only in this, that monopoly is by patent from the king, and ingrossing by the act of the subject between party and party."³

§ 4. **History of monopolies.**—The growth of public opinion regarding monopolies, as illustrated by edicts, statutes and decisions, is not only of interest, but is essential to a correct understanding of the law concerning combinations at the present day.

In the year A. D. 483, the Emperor Zeno issued to the Praetorian Prefect of Constantinople the following edict: "We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, either of his own authority, or under a rescript of an emperor already procured, or that may hereafter be procured, or under an imperial decree, or under a rescript signed by Our Majesty; nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed upon among themselves. Workmen and contractors for buildings, and all who practice

¹ 4 Bl. Com. 159.

Slaughter-House Cases, 16 Wall. 103

² 3 Coke's Inst. 181. See Charles (1872).

River Bridge v. Warren Bridge, 11 Pet. 607 (1837), Story, J. See also ³ Hawkins' Pleas of the Crown, vol. 1, p. 624.

other professions, and contractors for baths, are entirely prohibited from agreeing together that no one may complete a work contracted for by another, or that a person may prevent one who has contracted for a work from finishing it; full liberty is given to any one to finish a work begun and abandoned by another without apprehension of loss, and to denounce all acts of this kind without fear and without costs, and if any one shall presume to practice a monopoly, let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay 40 pounds of gold. Your court shall be condemned to pay 50 pounds of gold if it shall happen, through avarice, negligence, or any other misconduct, the provisions of this salutary constitution for the prohibition of monopolies and agreements among the different bodies of merchants, shall not be carried into effect.”¹

§ 5. In the edict of Louis XVI., in 1776, giving freedom to trades and professions, prepared by his minister, Turgot, he recites the contributions that had been made by the guilds and trade companies, and says: “It was the allurements of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. This illusion had extended so far that some persons asserted that the right to work was a royal privilege which the king might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred and imprescriptible of all.” He therefore regards it “as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity.”²

§ 6. In England.—Monopolies in great numbers were granted by Queen Elizabeth, and Hume describes the condition of affairs under her reign as follows: “The active reign of Eliza-

¹ 8 Canadian Law Times, 299.

² See note to Slaughter-House Cases, 83 U. S. on page 110.

beth had enabled many persons to distinguish themselves in civil and military employments; and the queen, who was not able from her revenue to give them any rewards proportioned to their services, had made use of an expedient which had been employed by her predecessors, but which had never been carried to such an extreme as under her administration. She granted her servants and courtiers patents for monopolies; and these patents they sold to others, who were thereby enabled to raise commodities to what price they pleased, and who put invincible restraints upon all commerce, industry, and emulation in the arts. It is astonishing to consider the number and importance of those commodities which were thus assigned over to patentees. Currants, salt, iron, powder, cards, calf-skins, fells, pouldavies, ox shin-bones, train-oil, lists of cloth, potashes, anise-seeds, vinegar, seacoals, steel, aquavitæ, brushes, pots, bottles, saltpetre, lead, accidents, oil, calamine stone, oil of blubber, glasses, paper, starch, tin, sulphur, new drapery, dried pilchards, transportation of iron ordnance, of beer, of horn, of leather, importation of Spanish wool, of Irish yarn; these are but a part of the commodities which had been appropriated to monopolists. When this list was read in the House, a member cried, 'Is not bread in the number?' 'Bread,' said every one with astonishment. 'Yes, I assure you,' replied he, 'if affairs go on at this rate, we shall have bread reduced to a monopoly before next parliament.' These monopolists were so exorbitant in their demands that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings. Such high profits naturally begat intruders upon their commerce; and in order to secure themselves against encroachments, the patentees were armed with high and arbitrary powers from the council, by which they were enabled to oppress the people at pleasure, and to exact money from such as they thought proper to accuse of interfering with their patent. The patentees of saltpetre, having the power of entering into every house, and of committing what havoc they pleased in stables, cellars or wherever they suspected saltpetre might be gathered, commonly extorted money from those who desired to free themselves from this damage or trouble. And while all domestic intercourse was thus restrained, lest any scope should remain for industry, almost every species of foreign

commerce was confined to exclusive companies, who bought and sold at any price that they themselves thought proper to offer or exact."¹

§ 7. In the Long Parliament, Sir John Culpeper indulged in the following vigorous language: "They are a nest of wasps — a swarm of venom which have overswept the land. Like the frogs of Egypt, they have gotten possession of our dwellings and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl and powdering-tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker! I have echoed to you the cries of the kingdom. I will tell you their hopes. They look to Heaven for a blessing on this parliament."

The "monopolies" here described were nothing more than royal patents, and restriction of competition under them was effected, not by the act of the individual, but by the exclusive character of the grant.

¹4 History of England (Harper's ed.), 335, 336. Macaulay says (History of England, vol. I, p. 58): "It was in the parliament of 1601 that the opposition which had, during forty years, been silently gathering and husbanding strength, fought its first great battle and won its first victory. The ground was well chosen. The English sovereigns had always been intrusted with the supreme direction of commercial police. It was their undoubted prerogative to regulate coins, weights, measures, and to appoint fairs, markets and ports. The line which bounded their authority over trade had, as usual, been but loosely drawn. They therefore, as usual, encroached on the province which rightfully belonged to the legislature. The encroachment was, as usual, patiently borne till it became serious. But at length the queen took upon herself

to grant patents of monopoly by scores. There was scarcely a family in the realm that did not feel itself aggrieved by the oppression and extortion which the abuse naturally caused. Iron, oil, vinegar, coal, lead, starch, yarn, leather, glass, could be bought only at exorbitant prices. The House of Commons met in an angry and determined mood. It was in vain that a courtly minority blamed the speaker for suffering the acts of the queen's highness to be called in question. The language of the discontented party was high and menacing, and was echoed by the voice of the whole nation. The coach of the chief minister of the crown was surrounded by an indignant populace, who cursed *monopolies* and claimed that the prerogative should not be allowed to touch the old liberties of England."

§ 8. **Legality of monopolies.**—The question of the legality of such licenses first arose, in 1602, in the case of *Darcy v. Allen*.¹ The plaintiff in this case had received a patent which gave him the exclusive privilege for twenty-one years of manufacturing playing-cards. This right was infringed by the defendant, and the plaintiff brought a suit for damages. The defendant set up the illegality of the plaintiff's patent. The grant was declared void for the following reasons:

“(1) All trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth), and exercise men and youth in labor, for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth; and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject.

“(2) The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees.

“(3) The queen was deceived in her grant; for the queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public.

“(4) This grant is *primæ impressionis*, for no such was ever seen to pass by letters patents under the great seal before these days, and therefore it is a dangerous innovation, as well without any precedent or example as without authority of law or reason.”

§ 9. **Incidents of monopolies.**—“Monopolies” were also said to have the following inseparable incidents:

“(a) That the price of the same commodity will be raised; for he who has the sole selling of any commodity may and will make the price as he pleases.

“(b) That after the monopoly granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the commonwealth.

¹ 11 Co. 84; Noy, 173; Moore, 673; 8 Co. 125.

“(c) It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary.”¹

But it is obvious that these incidents constitute none of the essential elements of a monopoly, for while the price of the product or commodity may be and is usually raised, and while the product may deteriorate in quality, and employees and artisans may not be benefited by the monopoly, it is also true that the reverse of these various conditions may result without affecting the existence of the monopoly; that is, the prices of the monopoly may be lower and the quality of the product be improved and the condition of the employees benefited, and the monopoly still be as complete and as obnoxious as under the adverse conditions.

§ 10. Statute of James I.—Parliament, by statute 21 James I. (1624), chapter 3, abrogated the practice of granting monopolies save in certain cases.

The preamble and first section of the statute are as follows:

“Forasmuch as your most excellent Majesty, in your royal judgment, and of your blessed disposition to the weal and quiet of your subjects, did in the year of our Lord God one thousand six hundred and ten, publish in print to the whole realm, and to all posterity, That all grants and monopolies, and of the benefit of any penal laws, or of power to dispence with the law, or to compound for the forfeiture, are contrary to your Majesty’s laws, which your Majesty’s declaration is truly consonant and agreeable to the ancient and fundamental laws of this your realm: (2) And whereas your Majesty was further graciously pleased, expressly to command, that no suiter should presume to move your Majesty for matters of that nature: (3) yet nevertheless upon misinformations, and untrue pretences of publick good, many of such grants have been unduly obtained, and unlawfully put in execution, to the great grievance and inconvenience of your Majesty’s subjects, contrary to the laws of this your realm, and contrary to your Majesty’s most royal and blessed intention so published as aforesaid: (4) For avoiding whereof, and preventing of the like in time

¹7 Harvard Law Review, 342, 343.

to come, may it please your excellent Majesty, at the humble suit of the lords spiritual and temporal, and the commons, in this present parliament assembled, That it may be declared and enacted; (5) and be it declared and enacted by authority of this present parliament, That all monopolies, and all commissions, grants, licences, charters and letters patents heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politick or corporate whatsoever, of or for the sole buying, selling, making or using of any thing within this realm, or the dominion of Wales, (6) or of any other monopolies, or of power, liberty or faculty, to dispense with any others, or to give licence or toleration to do, use or exercise any thing against the tenor or purport of any law or statute; (7) or to give or make any warrant for any such dispensation, licence or toleration to be had or made; or to agree or compound with any others for any penalty or forfeitures limited by any statutes; or of any grant or promise of the benefit, profit or commodity of any forfeiture, penalty or sum of money, that is or shall be due by any statute, before judgment thereupon had; (8) and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering or countenancing of the same or any of them; (9) are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect and in no wise to be put in use or execution."

Letters patent and grants of privilege for the sole working or making of any manner of new manufacture are expressly saved to the first and true inventors of such manufactures.

Letters patent concerning printing and the manufacture of saltpetre, gunpowder, ordinance and shot and the mining of alum are also excepted.¹

¹ Referring to this statute the learned author of Coke's Institutes says (vol. III, ch. 85):

"It appeareth by the preamble of this act (as a judgment in parliament) that all grants of monopolies are against the ancient and fundamental laws of this kingdom, and therefore it is necessary to define what a monopoly is. . . .

"That monopolies are against the ancient and fundamental laws of the realm (as it is declared by this act), and that the monopolist was in times past, and is much more now, punishable for obtaining and procuring of them, we will demonstrate it by reason and prove it by authority.

"Whatsoever offense is contrary to the ancient and fundamental laws

§ 11. In enumerating monopolies that were illegal under the law of England, Hawkins says:¹

"It is said that all grants of this kind relating to any known trade are made void by the common law, as being against the freedom of trade, and discouraging labor and industry, and restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniences to the public.

"The king, and none but the king, by his charter, may constitute fraternities for the management of foreign and domestic trade,² who may make by-laws in restraint, if they be for the regulation of trade.³

"And upon this ground it hath been (a) resolved that the king's grant to any particular corporation of the sole importation of any merchandise is void, whether such merchandise be prohibited by statute or not.

"Hence also it seems that the king's charter, empowering particular persons to trade to and from such a place, is void, so far as it gives such persons an exclusive right of trading and debarring all others; and it seems now agreed that nothing can exclude a subject from trade but an act of parliament.⁴

"And for the like reasons it hath been resolved that the grant of the sole (b) ingrossing of wills and inventories in a spiritual court, or of the sole (c) making of bills, pleas and writs in a court of law, to any particular person, is void.

"Also it hath been adjudged that the king's grant of the sole making, importing, and selling of (d) playing cards is void notwithstanding the pretense that the playing with them is a matter merely of pleasure and recreation, and often much abused, and therefore proper to be restrained; for since the playing with them is in itself lawful and innocent, and the

of the realm is punishable by law; but the use of a monopoly is contrary to the ancient and fundamental laws of the realm, therefore the use of a monopoly is punishable by law.

"That offense which is contrary to the ancient and fundamental laws is *malum in se*. The minor is proved by this declaration in parliament.

"The liberty that the subject hath

to go to any clerk in the king's court cannot be restrained but by parliament."

¹ Hawkins' Pleas of the Crown, 624.

² 8 Co. 125.

³ See Com. Dig., By-law, b. 8, c. 8; Trade, B. D. 1 D. 4; 10 Mod. 139.

⁴ Ray, 489; Chan. Cas. 165; Vernon, 127; Skinner, 165; 3 Mod. 126; 3 Bacon, 637, c. 8; Trade, 4

making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than by any other employment.

“Also it is holden that the procuring or making use of an unlawful monopoly is further restrained by the common law, by subjecting those who are guilty thereof to a fine and imprisonment for the offense, as being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom. And it is said that there are precedents of prosecutions of this kind in former days; but I cannot find any modern instance thereof.”

§ 12. **American comment.**—In the famous Charles River Bridge case¹ the proprietors of the Charles River Bridge claimed an exclusive franchise for a bridge over the Charles river under a charter from the legislature, and sought to restrain, by injunction, the Warren Bridge Company from erecting a competing bridge in the immediate vicinity. The claim of the Charles River Bridge Company was not sustained in either the state courts or the supreme court of the United States. In his dissenting opinion Justice Story spoke as follows concerning the law relating to monopolies:

“Again, it is argued that the present grant is a grant of a monopoly, and of exclusive privileges, and therefore to be construed by the most narrow mode of interpretation. The sixth article of the bill of rights of Massachusetts has been supposed to support the objection. ‘No man, nor corporation, or association of men, have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community than what arises from the consideration of services rendered to the public; and this title, being in nature neither hereditary nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver or judge is absurd and unnatural.’ Now, it is plain that, taking this whole clause together, it is not an inhibition of all legislative grants of exclusive privileges, but a promulgation of the reasons why there should be no hereditary magistrates, legislators or judges. But it admits, by necessary implication, the right to grant exclusive privileges for public services, without ascertaining of what nature those services may be. It might be sufficient to say that all the learned judges in the

¹ Charles River Bridge v. Warren Bridge et al., 11 Pet. 420.

state court admitted that the grant of an exclusive right to take toll at a ferry, or a bridge, or a turnpike, is not a monopoly which is deemed odious in law, nor one of the particular and exclusive privileges, distinct from those of the community, which are reprobated in the bill of rights. All that was asserted by the judges opposed to a liberal interpretation of this grant was that it tended to promote monopolies.¹

“Again, the old colonial act of 1641, against monopolies, has been relied on to fortify the same argument. That statute is merely in affirmance of the principles of the English statute against monopolies,² and, if it were now in force (which it is not), it would require the same construction.

“There is great virtue in particular phrases; and when it is once suggested that a grant is of the nature or tendency of a monopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice, which grew up in former times from the gross abuses of the royal prerogatives; to which, in America, there are no analogous authorities. But what is a monopoly as understood in law? It is an exclusive right granted to a few of something which was before of common right. Thus, a privilege granted by the king for the sole buying, selling, making, working or using a thing, whereby the subject, in general, is restrained from that liberty of manufacturing or trading which before he had, is a monopoly.³

“Coke, in his Pleas of the Crown,⁴ has given this very definition of a monopoly, and that definition was approved by Holt and Treby (afterwards chief justices of king’s bench), *arguendo*, as counsel, in the great case of the *East India Co. v. Sandys*.⁵ His words are that a monopoly is ‘an institution by the king, by his grant, commission or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of every thing, whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.’ So that it is not the case of a monopoly if the subjects had not the common right

¹ See the case, *Hartwell v. Hemmenway* (1828), 7 Pick. 116, 132, 137.

² 21 James I., ch. 8.

³ 4 Black. Com. 159; Bac. Abridg., Prerogative, F. 4.

⁴ 8 Inst. 181.

⁵ 10 How. State Trials, 886.

or liberty before to do the act, or possess and enjoy the privilege or franchise granted, as a common right.¹ And it deserves an especial remark that this doctrine was an admitted concession, pervading the entire arguments of the counsel who opposed as well as of those who maintained the grant of the exclusive trade in the case of the *East India Co. v. Sandys*, a case which constitutes, in a great measure, the basis of this branch of the law.”

§ 13. In the *Slaughter-House Cases*² Justice Field, in his dissenting opinion, said: “It will not be pretended that under the fourth article of the constitution any state could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other states. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes or boots or silk, or the sole right to sell those articles in the state so as to exclude non-resident citizens from engaging in similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the state exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the state to exclude at any time the citizens of other states from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

“Now, what the clause in question does for the protection of citizens of one state against the creation of monopolies in favor of citizens of other states, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any state. The fourteenth amendment places them under the guardianship of the national authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great

¹ 10 How. State Trials, 425.

² 16 Wall. 36.

Case of Monopolies decided during the reign of Queen Elizabeth.

“A monopoly is defined ‘to be an institution or allowance from the sovereign power of the state by grant, commission or otherwise, to any person or corporation, for the sole buying, selling, making, working or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.’ All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law, as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential to the free and successful prosecution by any butcher of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings and other conveniences for the successful prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade.”¹

¹Continuing in the Slaughter-House Cases, Justice Field said: “The reasons given for the judgment in the Case of Monopolies apply with equal force to the case at bar. In that case a patent had been granted to the plaintiff giving him the sole right to

import playing-cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing

§ 14. Referring to the struggle against monopolies, Justice Field said: "The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21 James I., by which it was declared 'that all monopolies and all commissions, grants, licenses, charters and letter patents, to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything' within the realm or the dominion of Wales, were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and as such had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of parliament. 'All trades,' said the court, 'as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject.' The case of *Davenant and Hurdis* was cited in support of this position. In that case a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth

dressed by a cloth-worker, not being a brother of the society, should put one-half of his cloth to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting ten shillings; 'and it was adjudged that the ordinance, although it had countenance of a charter, was against the common law, because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly, and therefore such ordinance, by color of a charter or any grant by charter to such effect, would be void.'

"Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman."

“The common law of England, as is thus seen, condemned all monopolies in any known trade and manufacture and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I., to which I have referred, only embodied the law as it had been previously disregarded by the sovereigns of that country.”

§ 15. **The common law the basis of American law.**—The common law is the basis of American law, and English statutes in force at the time of the colonization of this country, in so far as they were applicable to the new and strange conditions, became part of the common law of this country,—among them the statute of James I. against monopolies.

In his dissenting opinion in the *Slaughter-House Cases* Justice Field refers to the common law as follows:

“The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the congress of the United Colonies in 1774 as a part of their ‘indubitable rights and liberties.’ Of the statutes, the benefits of which were thus claimed, the statute of James I. against monopolies was one of the most important. And when the colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men ‘with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men.’

“If it be said that the civil and not the common law is the basis of the jurisprudence of Louisiana, I answer that the de-

cree of Louis XVI., in 1776, abolished all monopolies of trades and all special privileges or corporations, guilds and trading companies, and authorized every person to exercise, without restraint, his art, trade or profession; and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that state of the civil law as the basis of her jurisprudence, freedom of pursuit has always been recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that state against any abridgment of their common rights, as in other states. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights,—rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.”¹

¹ In the dissenting opinion of Justice Bradley in the same cases, he says: “The next question to be determined in this case is: Is a monopoly or exclusive right, given to one person or corporation to the exclusion of all others, to keep slaughter-houses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose?”

“The keeping of a slaughter-house is part of, and incidental to, the trade of a butcher—one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers, of a large city and an extensive district to slaughter their cattle in another person’s slaughter-house and pay toll therefor is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary and un-

just. It has none of the qualities of a police regulation. If it were really a police regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, etc., is clearly a police regulation. That portion which allows no one but the favored company to build, own or have slaughter-houses is not a police regulation and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the southern states have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light.

“The granting of monopolies or exclusive privileges to individuals or

§ 16. **The federal constitution.**— Under the federal constitution congress has power to “promote the progress of science and useful arts by securing, for limited times, to authors and inventors exclusive rights to their respective writings and discoveries.” And it has been held¹ that the fact that certain electric companies owning valuable patents entered into a combination which might be illegal does not affect or vitiate, in any way, the patent.

“We are not disposed to investigate upon the present case the character of the combination which has been formed under the name of the General Electric Company. Whether that combination is intended to fetter competition, and is illegal as one in restraint of trade, is a question which we should not

corporations is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppression of such monopolies, and for abolishing the prerogative of creating them, was made and was successful. The statute of 21 James abolishing monopolies was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These laws have always been sustained as beneficial to the state. But all other monopolies were abolished as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle no English-speaking people have ever endured such an odious badge of tyranny.

“It has been suggested that this

was a mere legislative act, and that the British parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets and other establishments of a public kind. It requires but a slight acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.”

¹ Edison Electric Light Co. et al. v. Sawyer-Man Electric Co., 53 Fed. R. 592.

undertake to decide upon the evidence before us and in a suit to which it is not a party. The present complainants are entitled by the patent laws to a monopoly, for the term of the patent, of the manufacture and sale of the lamps made under it. The right to this monopoly is the very foundation of the patent system. They do not lose that right merely because they may have joined in a combination with others, holding other patents securing similar monopolies, which combination may, when judiciously examined in a proper forum, be held to be unlawful. We do not feel justified in assuming, upon the facts before us in the present suit, that the use which the complainants propose to make of the injunction—an injunction which seems necessary to secure their monopoly and make their patents fruitful—will be such as to promote any other monopoly. When it shall be made to appear that some one, to whom in fairness and good conscience these complainants should sell their lamps, has been arbitrarily refused them, save upon oppressive and unreasonable terms, it will be time to consider whether the complainants should be allowed to continue in possession of the injunction.”¹

¹“While it is true that letters patent secure a monopoly in the thing patented, so that the right to make, vend or use the same is vested exclusively in the patentee, his heirs and assigns, for a limited period, it is not true that a right to make, vend or use the same in a manner which would be unlawful except for the letters patent thereby becomes lawful under the act of congress, and beyond the power of the states to regulate or control.

‘This doctrine is fully discussed and settled in *Jordon v. Overseers of Dayton*, 4 Ohio, 295, and *Patterson v. Kentucky*, thus: The right to enjoy a new and useful invention may be secured to the inventor and protected by national authority against all interference; but the use of tangible property which comes into existence by the application of the discovery is not beyond the control of state legislation, simply be-

cause the patentee acquires a monopoly in his discovery. “The sole operation of the statute is to enable him to prevent others from using the products of his labors without his consent; but his own right of using is not enlarged or affected.” The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by state laws when the public welfare requires it.

“It appears to us, as a proposition too plain to admit of argument, that where the beneficial use of patented property, or any species of property, requires public patronage and governmental aid, as, for instance, the use of public ways and the exercise of the right of eminent domain, the state may impose such conditions and regulations as in the judgment of the lawmaking power are neces-

§ 17. Powers of state legislatures and municipalities.— The legislatures of the several states may, within the limits of their respective constitutions, grant certain privileges in the nature of a monopoly for the good of the entire public. And municipalities within the powers granted by the legislature frequently grant franchises and enter into contracts which confer upon individuals and corporations certain exclusive rights. But these privileges are granted only in connection with the performance of some public or *quasi*-public service, and are jealously regarded by both the people and the courts, as may be readily seen from an examination of the cases in the note.¹

sary to promote the public good." *State ex rel. etc. v. Telephone Co.*, 36 Ohio St. 296, 297.

A public telephone company, having furnished telephonic facilities to one telegraph company with the consent of its licensor, cannot refuse to furnish like facilities to all other telegraph companies, notwithstanding it is forbidden to do so by its contract with the owner and licensor of the patent. Such portion of the contract is void. *Commercial Union Tel. Co. v. New England Teleph. & Teleg. Co.*, 61 Vt. 241, 17 Atl. R. 1071, 15 Am. St. R. 893, 5 L. R. A. 161.

The validity of such a contract cannot be maintained under the Revised Statutes of the United States, section 4884, providing that every patent shall give the patentee, etc., the exclusive right to make, use and vend the patented article. The monopoly conferred by a patent cannot exclude any portion of the public from the benefit of it, when it is used for a public purpose. *Commercial Union Tel. Co. v. New England Teleph. & Teleg. Co.*, 61 Vt. 241, 17 Atl. R. 1071, 15 Am. St. R. 893, 5 L. R. A. 161.

¹ Monopoly is viewed with such hostility by the courts that even the power of the legislature to make a contract conferring a monopoly has been denied. In *St. Louis Gas Light Co. v. Laclede Gas Light Co.* (not re-

ported, but summarized at length as follows in Greenhood on Pub. Pol., ch. 5, pp. 672, 673), the St. Louis court of appeals held that a charter with the exclusive privilege of making and vending gas in the city of St. Louis, Missouri, is void as creating a monopoly. The following are the important reasons for this judgment in the opinion of Lewis, C. J.: The right of property is one of those to whose protection the highest aims of government are directed. The right to labor for the production of property is no less fundamental and assailable. "The right of property is equally invaded by obstructing the free employment of the means of production as by violently depriving the proprietor of the product." Say's Pol. Econ. 133. Such rights require no grant from the sovereign, but are the common property of all citizens. "This equality of right, with exemption of all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of the citizens of the United States. To them, everywhere, all pursuits, all vocations, all professions are open without restrictions than such as are imposed equally upon all others of the same age, sex and condition." 83 U. S. 109. What, then, is the necessary effect, when the state undertakes to confer upon one person or

§ 18. Powers of a municipal corporation construed strictly. The powers of a municipal corporation are strictly limited to:

1. Powers expressly granted by charter or general incorporation law, together with all powers necessarily implied or incidental to those expressly granted.

2. All powers indispensable to the legitimate objects of the corporation.

All grants of exclusive privileges by municipal authorities must be within the terms and scope of the foregoing powers.

corporation the sole and exclusive privilege of pursuing a lawful calling, labor or occupation, in the manufacturing or selling of any commodity? The first visible effect is that all persons other than the grantee are directly forbidden to pursue that calling, labor or occupation. Here is no franchise within the definitions given. The privilege conferred and withheld is not one "which cannot be exercised without a legislative grant," and it is one which does "belong to the citizens of a country generally by common right." The persons deprived are not in the situation of one who is "only excluded from that to which he never had any right." They have always been, and still should be, entitled of natural and unquestionable right. There is no granting of anything from the state's prerogatives; no protection given to an exclusive ownership already vested; nothing pretended to be done for preservation of public health, morals or safety. The act is sustained by no element of power confided to the government by constitutional or other authority, and comes within the technical definition of a monopoly. "A monopoly is defined to be an institution or allowance from the sovereign power of the state, by grant, commission or otherwise, to any person or corporation, for the sole buying, selling, making, working or using of anything whereby

any person or persons, bodies politic or corporate, are sought to be restrained of any liberty they had before, or hindered in their lawful trade. All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law, as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities. . . . From what has been said the conclusion naturally follows that so much of the plaintiff's charter as attempts to grant an exclusive privilege of making or vending illuminating gas in the city of St. Louis is void, and cannot be judicially enforced. No reasonable distinction can be entertained between illuminating gas as an article of manufacture and trade, and any other commodity which people may purchase for their personal comfort and convenience. Such a distinction has never been judicially recognized, unless in its strict relation to the use of the public streets for conveying the article through pipes, or the lighting of streets by municipal authority for the public benefit. So much of the charter as grants an exclusive right to use the streets of the city for the laying of pipes to convey illuminating gas was a law-

§ 19. The rule of construction governing grants of exclusive privileges.— Legislative grants are to be construed against the grantee and in favor of the public, and nothing passes unless it is clear that it was the intent that it should pass. Any ambiguity in the terms of the grant must operate against the grantee and in favor of the public.

This rule is applied with great severity to all parties claiming exclusive rights and privileges as against the public.¹

§ 20. Exclusive right to lay gas-pipes in streets.— A grant by a city of the exclusive right to lay gas-pipes in the streets is

ful exercise of power vested in the general assembly, and was and is effectual for the time being. Whether it must continue to be effectual under all circumstances until the expiration of the plaintiff's charter depends upon other considerations." But see also *Case of Philadelphia, etc. R. R. Co.*, 6 Whart. (Pa.) 25, 46 (1840); *Slaughter-House Cases*, *Butchers' Union Ass'n of New Orleans v. Crescent City Live-Stock Landing and Slaughter-House Co.*, Esteben et al. v. State, 16 Wall. (U. S.) 36 (1872), affirming *State v. Fagan*, 22 La. Ann. 545 (1870); *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray (Mass.), 1 (1854); *Camblos v. P. & R. R. Co.*, 4 Brewst. (Pa.) 563, 594 (1873). See further, *East India Co. v. Sandys*, Skin. 165 (1685); *Darcy v. Allen*, Moor, 671 (1602). (*Greenhood on Public Policy*, ch. 5, pp. 672, 673.)

Compare *Townsend v. State*, 147 Ind. 624, 47 N. E. R. 19 (1897); *Le Claire v. City of Davenport*, 13 Iowa, 210; *City of New Orleans v. Guillette's Heirs*, 12 La. Ann. 818; *Gale v. Kalamazoo*, 23 Mich. 344.

In *Mayor of the City of Hudson v. Thorne*, 7 Paige, 261, an application was made to the chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them,

intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions, within certain specified limits in the city, without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city, but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the chancellor said: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business."

¹ *Perrine v. C. & D. Canal Co.*, 9 How. 172; *Jackson Co. Horse Ry. Co. v. Rapid Transit Co.*, 24 Fed. R. 806; *Proprietors, etc. v. Wheeley*, 2 Barn. & Adol. 793. See also *Charles River Bridge v. Warren Bridge*, 11 Pet. 422.

void.¹ The court said: "As, then, no consideration whatever, either of a public or private character, was reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the bill of rights, the first section of which declares 'that no men or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."²

But while the grant of an exclusive right to lay gas-pipes in the streets of a city may be void as in the nature of a monopoly, it is undoubtedly the law that the right to obstruct, to tear up and use the streets of a city may be denied by municipal authority in the exercise of a wise and sound discretion, so that, in the exercise of such discretion, terms and conditions may be imposed upon the further and additional use of streets by rival and competing companies so as to virtually give the company already in possession a monopoly. While the business of manufacturing gas is an ordinary business, the selling of gas and the distribution of it to the public is quite unlike the handling of other products; and it has been held that a charter giving to a gas-light company exclusive right for the period of fifty years of making and supplying gas constituted a contract which could not be impaired by state legislation, and could be enforced as against a rival and competing company.³

In the case last referred to, the supreme court of the United States said: "We have seen the manufacture of gas and its distribution for public and private use by means of pipes laid,

¹ Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19.

³ New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

² See also cases cited in note to section 17.

under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity, for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety.”¹

A charter which authorizes a city “to cause its streets to be lighted” does not confer upon the city power to grant to a company the exclusive right to furnish gas for a period of thirty years.²

¹ *New Orleans Gas Co. v. Louisiana Light Co.* (1885), *supra*.

In *New Orleans Gas Co. v. Louisiana Light Co.* it appeared that the plaintiff had a charter which gave it the exclusive right, for the period of fifty years, of making and supplying gas-light to the city of New Orleans, by means of pipes or conduits laid in the streets, to such persons as might voluntarily choose to contract for it. The defendant was subsequently chartered under a general law authorizing the formation of corporations for certain purposes, among which was the construction and maintenance of works for supplying cities or towns with gas, and it had obtained provision from the common council of New Orleans to use its streets and other public ways and places to lay mains, pipes and conduits. This it was proceeding to do when a suit was brought to restrain it, and it was held that the exclusive grant, in connection with the facts shown, constituted a contract which state legislation could not impair. In disposing of the case it was said: “Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pur-

suit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public places of New Orleans, and place their pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city acting under legislative authority.” . . .

To the same effect is the decision of the supreme court of Louisiana in *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138, 147, in which it was said: “The right to operate gas-works and to illuminate a city is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas-pipes, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and, in the exercise of the police power, the state could carry on the business itself, or select one of several agents to do so.”

² *Saginaw Gas Light Co. v. City of Saginaw*, 28 Fed. R. 529.

Under a charter conferring upon a city the power "to cause said city or any part thereof to be lighted with oil or gas," the city may contract for lighting for a long period of years, but has no authority to grant any exclusive right to a gas company.¹

Inasmuch as the public may undertake or assume the control of the lighting of the streets, the adoption of uniform regulations for the manufacture and distribution of gas and the control generally of the gas supply is within the power of the municipality.²

A state may employ a private corporation or individuals in the construction of works necessary for the health, comfort and convenience of its citizens, and in so doing may make contracts granting certain exclusive privileges and rights.³

The right to disturb streets and highways and utilize the same for the distribution of gas is a franchise, and may be granted or withheld within the sound discretion of the state or municipal body controlling such streets.⁴

A state owning its gas-works may lease the same and contract with the lessee that it will not in any way interfere with the exclusive rights vested by the lease in the lessee.⁵

§ 21. The right to regulate exercise of franchise remains. But the grant of exclusive privileges for the manufacture and distribution of gas does not restrict the power of a state or a municipality acting within constitutional limitations to establish and enforce regulations for the protection of the public. "Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals and the public safety, in the same sense and

¹ *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 266. See also *Richmond Co. Gas Co. v. Middletown*, 59 N. Y. 228.

In the case of *State v. Milwaukee Gas Co.*, 29 Wis. 460, it was conceded that the grant of an exclusive right to lay pipes, for the purpose of conducting gas, in the streets, avenues and other public places of a city, coupled with the exclusive right to manufacture and sell gas to its inhabitants for fifteen years, created a monopoly.

² *New Orleans Gas Co. v. Louisiana Light Co.*, *supra*; *New Orleans v. Clark*, 95 U. S. 644.

³ *New Orleans v. Clark*, *supra*.

⁴ *New Orleans Gas Co. v. Louisiana Light Co.*, *supra*; *New Orleans v. Clark*, *supra*; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Boston v. Richardson*, 14 Allen, 346; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138.

⁵ *Bailey et al. v. City of Philadelphia*, 184 Pa. St. 594, 39 Atl. R. 494.

to the same extent as are all contracts and all property, whether owned by natural persons or corporations."¹

§ 22. Exclusive right of maintaining water-works within a city.—The grant of the exclusive use of streets and alleys for the construction and maintaining of water-works within the corporate limits is void as contrary to a constitutional provision declaring that perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed.²

§ 23. Exclusive rights concerning highways and bridges. Grant of exclusive rights concerning bridges over navigable streams and concerning public highways have been frequently sustained as within the police power.³

§ 24. Valid grant of exclusive privileges cannot be impaired by subsequent legislation.—It is well settled that a valid grant of an exclusive privilege or right, even though it be in the nature of a monopoly, cannot be impaired by either subsequent legislation or even by amendments to the constitution specifically seeking to abolish any monopoly features in the charter of any corporation in existence.⁴

¹ *New Orleans Gas Co. v. Louisiana Light Co.* (1885), 115 U. S. 672.

² *Thrift v. Board of Commissioners of the Town of Elizabeth City et al.* (1898), 122 N. C. 81, 80 S. E. R. 349.

³ *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Binghamton Bridge*, 8 Wall. 51; *West River Bridge Co. v. Dix*, 6 How. 507. For other cases involving special privileges and rights, such as exemption from taxation for a time, etc., see *Asylum v. New Orleans*, 105 U. S. 862, 868; *Home of the Friendless v. Rouse*, 8 Wall. 480; *New Jersey v. Wilson*, 7 Cranch, 164, 166; *State Bank of Ohio v. Knoop*, 16 How. 363, 876; *Gordon v. Appeal Tax Court*, 3 How. 133; *Wilmington R. Co. v. Reid*, 18 Wall. 264, 266; *Humphrey v. Pegues*, 16 Wall. 244, 248, 249; *Farrington v. Tennessee*, 95 U. S. 679, 689.

A charter for the exclusive use of the streets of a city for a horse railway for fifty years is not violated by

a city ordinance authorizing a rival company to construct a cable railway on the same streets, it being held that the original charter should be strictly construed. *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 80 Fed. R. 324.

⁴ *New Orleans Gas Co. v. Louisiana Light Co.*, *supra*. See also *Delaware Railroad Tax*, 18 Wall. 206; *Greenwood v. Freight Co.*, 105 U. S. 13; *New Jersey v. Yard*, 95 U. S. 104.

To the effect that a state cannot impair the obligation of a contract by amendment to her constitution any more than by legislative enactment, see generally *Railroad Co. v. McClure*, 10 Wall. 511; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 429; *Sedgwick's Stat. & Const. Law*, 637; *New Jersey v. Wilson*, 7 Cranch, 164; *Providence Bank v. Billings*, 4 Pet. 514; *Green v. Biddle*, 8 Wheat. 1; *Woodruff v. Trapnall*, 10 How. 190; *Wolff v. New Orleans*, 108 U. S. 358.

§ 25. **Conflict among the authorities.**— There is, however, such a conflict among the authorities as to the rights of municipalities to grant exclusive privileges that no proposition of general validity can be laid down, but each case as it arises must be considered in connection with the constitutional provisions and the legislative enactments of the particular state. However, certain general propositions may be laid down as follows:

§ 26. **Some general propositions.**— A grant of an exclusive privilege in the nature of a monopoly is not valid unless it relates to the performance of some work or duty of a more or less public nature, and which the public itself might with propriety undertake, and which must to a greater or less extent be regulated by the public.

The enjoyment of a grant of an exclusive privilege in the nature of a monopoly is at all times subject to the reasonable control and regulation of the legislative or municipal body granting the same for the protection of the public.

This power to control and regulate does not extend to the impairment of the grant or contract, but does extend to the protection of the life, health and imperative convenience of the public.

So far as the life, health and imperative convenience of the public are concerned, the power to regulate and control should not be limited in any manner by the terms of the original grant or contract.

In the opinion of the writer, this power to regulate and control the enjoyment of an exclusive privilege or franchise — a power unquestioned as regards public life and health — should also extend to the protection of the public from extortion. In short, no grant — no matter how explicit its terms — should be so construed as to bind legislative or municipal bodies to the observance of terms that have become oppressive and outrageous under changed conditions. Such a construction builds up American monopolies far more dangerous and oppressive than the ancient English, for the crown and parliament could revoke and abolish grants at will; whereas grants and franchises in this country are not so easily modified or abrogated.

A franchise or grant of an exclusive privilege to perform some public or semi-public duty is essentially different from a private contract. One legislature or municipal body should not

be permitted to contract for the performance of any public work on such terms as to debar future legislatures or municipal bodies from performing their duties, leaving them moribund and helpless in the face of some iron-clad contract. The power of each legislature or municipal body to fully perform all its duties is not to be curtailed by a contract in effect delegating to an individual or private corporation certain public work; the contract is valid only in so far as it does not interfere with the essential powers of subsequent legislative bodies. It will be recognized as in full force for its full term, in a sense, as if re-made by each succeeding body and adapted to changed conditions.

§ 27. The essence of monopoly.—The very essence of a monopoly is the grant of a power to control products and prices. The existence of the monopoly is not affected by the manner in which the power is exercised. If the power to control production and prices arises from a grant of an exclusive nature and is unrestricted, the monopoly is absolute.

§ 28. The law syllogistically stated.—The law regarding monopoly may be syllogistically stated as follows:

1. All grants of monopolies are void.
2. All grants of exclusive privileges wherein the grantee is given the power to control the product and the price of the same are monopolies.
3. All grants of exclusive privileges wherein the grantee is given power to control the product and the price are void.

It would follow from the foregoing that a franchise whereby a gas company, for instance, is given the exclusive right to manufacture and supply gas to the inhabitants of a city is void as a monopoly if under the terms of the grant the courts be compelled to hold that the company is given the power to control the production of gas and the price of the same; but such grant of exclusive privileges may be sustained if it is construed that the right is reserved to the public to reasonably control and regulate both the product and the price of the same.

In other words, in construing grants and franchises conferring exclusive privileges in the nature of monopolies, such grants and franchises must be held void if they amount to a monopoly, and can be sustained only by holding that the power to absolutely and arbitrarily control product and price is not conferred.

§ 29. **Elements essential to a monopoly.**—From a review of the authorities cited, it is apparent that the following elements are essential to a monopoly:

(a) A grant, commission or franchise from the sovereign authority.

(b) To a certain, definite grantee — which may be a person or persons or a corporation.

(c) Of an exclusive privilege — usually for the sole buying, selling, making, working or using of some thing.

(d) Whereby the public in general is restrained from freedom or liberty enjoyed before — that is, restrained from following trades, pursuits or callings theretofore free.

With the exception of letters patent and copyrights authorized by the federal constitution, and with the exception of a comparatively limited number of exclusive rights granted by legislatures and municipalities for the performance of certain public or *quasi*-public functions, there are no monopolies in the United States, and the application of the term “monopoly” to the exclusive control of a mine or an oil well, or the manufacture of a particular product, or the handling of a particular commodity, is a misuse of the term. In so far as the control of the manufacture or sale of any particular commodity depends upon a patent, then to that extent is it a monopoly in the true and historical sense of the word, but if the control of the manufacture or sale of any particular product depends upon conditions and circumstances which have nothing to do with a legislative grant, then such control is not a monopoly in the true and historical sense of the word.

§ 30. **Indiscriminate use of term “monopoly.”** — By long and indiscriminate usage the term “monopoly” has come to be applied to any control of any product, industry or enterprise, whether the control be absolute or not. An agent having the exclusive sale of any commodity in any given locality is spoken of as having a monopoly. A railroad between two points is referred to as a monopoly, notwithstanding the fact that its franchise does not grant exclusive privileges, and the field is open to capital to construct a parallel and competing line. A combination of several factories producing a particular commodity is spoken of as a monopoly, although there may be in existence a number of competing factories, and although

the field is open to any one who wishes to engage in the business.

§ 31. In short, the current test of whether or not any given enterprise is a monopoly is the magnitude or centralization of the enterprise; that is to say, an individual operating alone in a small way in competition with others is never referred to as enjoying a monopoly, but if the business of the individual increases to such a magnitude that he overshadows his competitors, and to a certain extent dominates the trade, then he begins to be referred to as enjoying a monopoly; while if, in the energetic prosecution of his business, the individual buys up and absorbs the competing plants, then he is condemned as a full-fledged monopolist, notwithstanding the fact that the field is still open to others of equal enterprise and with sufficient capital. If, as more often happens, a corporation expands along the same lines, the term "monopoly" is still more threateningly applied, as we shall see in decisions to be hereafter referred to.

§ 32. The mere fact that by long and indiscriminate usage the term "monopoly" has come to be applied to commercial and industrial undertakings which have absolutely nothing in common with monopolies originating under franchises and grants would be of little consequence were it not that the odium which very properly attached to true monopolies—historically considered—is made to attach to the industrial and commercial enterprises of the present day. We have already quoted the language of Justice Story where he says "when it is once suggested that a grant is of the nature or tendency of a monopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice which grew up in former times from the gross abuses of the royal prerogatives; to which, in America, there are no analogous authorities." It seems impossible for courts, lawyers or laymen to discuss dispassionately the so-called monopolies of the present day. The very use of the term "monopoly" suggests the manifold abuses suffered in former times, and the individual, corporation or combination under investigation suffers accordingly. Oddly enough there is practically no protest whatever against the very great and sometimes oppressive monopolies which result from the issuing of letters patent. Even in the case of the Bell tele-

phone patent there was no general protest or popular demand for the revision of the laws relating to patents. The people seem quite content to suffer exactions which amount almost to extortion, so long as the oppression is by a genuine monopoly, a monopoly as complete and perfect as any granted by her most gracious majesty Queen Elizabeth. But let two or more individuals or corporations propose to combine their plants in order to save much useless expense and suppress ruinous competition, the public and even the courts denounce the combination as a monopoly, in spite of the fact that many competing plants are either in existence or may be speedily erected.

§ 33. Few monopolies in true sense of term.—It cannot be too often reiterated that — with the few exceptions heretofore noted — there are no monopolies in the United States in the true sense of the term; and if the term is to be applied to commercial and industrial conditions which have no relation or connection with monopolies, then, in so applying the term, it should be divested of the odium which attaches by reason of the oppressive nature of the old grants by the crown.

§ 34. Tendency toward greater freedom of contract.—It is in considering the law relating to “regrating,” “forestalling” and “engrossing” that we shall lead up by logical steps to the consideration of the combinations of the present day. The history of the law of monopolies has been the history of the curtailment of the power of the crown or legislative authority and the enlargement of the liberty of the subject. We shall find that the development of the law relating to regrating, forestalling and engrossing has been along exactly parallel lines, namely, the curtailment of the interference by legislation with the liberty of the individual and the steady and progressive enlargement of that liberty. By enactments and decisions against monopolies, the crown has been deprived of the power to curtail the subject’s freedom in choice of enterprise and direction of individual energy. In a like manner the old enactments against regrating, forestalling and engrossing have been repealed, and the old decisions have been so modified that the individual is to-day, and has been for many years, at liberty to employ his time, energy and money to the best advantage.

§ 35. Certain reactionary decisions.—There is, as we shall shortly find, no law and practically no prejudice at the present time against regrating and against forestalling; there is still

considerable prejudice and possibly some law against engrossing; but the tendency has steadily been towards enlargement of the freedom of the individual — freedom to mine, to manufacture, to trade to the extent of his ability and to the extent of his capital, as he sees fit, even though in doing so he acquires absolute control of the market for the time being for any particular commodity. It will be found, however, upon examination that recent decisions concerning combinations and so-called monopolies, logically applied, are diametrically opposed to this tendency toward greater freedom for the individual, and are a return to that policy of legislative interference which more than a century ago proved so obnoxious to the sense of right and justice of Englishmen.

PART II.

CONTROLLING THE MARKET.

- CH. 2. REGRATING, FORESTALLING AND ENGROSSING.
- 3. "CORNERS."
 - 4. GAMBLING CONTRACTS, "OPTIONS" AND "FUTURES."

CHAPTER 2.

REGRATING, FORESTALLING AND ENGROSSING.

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§ 36. **Historically considered.**— There are few chapters of English law more interesting than those covering the offenses of regrating, forestalling and engrossing. The very terms are so little used nowadays as to be practically obsolete and require definition for most lawyers, to say nothing of laymen, and yet time was when these offenses commanded the attention of parliament and the time of the courts. They were treated as offenses of the most serious character, offenses against the welfare of society, and judges famous for their learning inveighed against them in language the severity of which would be considered harsh if applied to treason; in fact, treason and murder never did arouse the spleen excited by a case of regrating, forestalling or engrossing. We shall have occasion shortly to refer to some of these eloquent philippics; not because they are of any force or authority now, but to show how the world has progressed within practically the last century, and how very absurd and ridiculous were some of the most serious convictions of our forefathers.¹

¹ Chapter 89 of Part III of Coke's Institutes treated as follows of engrossing and forestalling:

"*Ingrossator*, or *engrossator*, of the English and French word, *grosse*, that is, great or whole, *unde* merchant-grossier, a merchant that selleth by great or whole-sale. We remember not that we have read of this word (*ingrosse*) in any act of parliament, book-case, or record, but rarely, before the said act of 5 Edw. 6. And there is an ingrosser by the common lawes, who is hereafter described. And there is an ingrosser by act of parliament, and he is described by the statute of 5 Edw. 6. And by that act a regrator is also described, who is a kind of ingrosser. Regrator is derived of the French word *regratement*, for huckstery. But in ancient time both the ingrossor and regrator were comprehended under forestaller.

"It was resolved by the justices and barons of the exchequer upon conference betwixt them, that salt is a victuall, and the buying and sell-

ing thereof was within the statute of 5 Edw. 6, for it was not only of necessity of itselfe for the food and health of man, but it seasoneth and maketh wholesome beef, pork, &c. butter, cheese, &c. and other viands. And Peryam, justice, said (Hil. 26 Eliz. in communi banco), that so it had been lately adjudged.

"Mich. 6 Jac. in scaccario, in an information by Baron against Boy, upon the statute of 5 Edw. 6, cap. 14, of ingrossers for buying and selling of apples; the defendant pleaded not guilty, and was found guilty. But the barons gave judgment against the informer, and caused an entry to be made in the margent of the record, that the judgment was given upon matter apparent to them, that apples were not within the said act, for that the act is to be intended of victuall necessary for the food of man, the words of the act being (corne, graine, butter, cheese, fish, or other dead victuall) which is as much as to say (of other dead victuall of like quality: *id est*, of like necessary

§ 37. The investigation of the law concerning regrating, forestalling and engrossing will serve to illustrate another truth, amply demonstrated in the history of legislation and jurisprudence, namely, that both legislatures and courts are most apt

and common use). And therefore apples being rather of pleasure than necessity, are not within the said statute no more than plumbs, cherries, or other fruit; and no information hath ever been exhibited for ingrossing of apples, plumbs, cherries, or other fruit; but the statute of 2 Edw. 6, cap. 15, doth forbid conspiracy of costermongers and fruiterers, and maketh such conspiracie unlawful. And the said judgment of the barons was affirmed in a writ of error in the exchequer chamber.

“Venditio brasei non est venditio victualium, nec debet puniri sicut venditio panis, vini, et cervisie, et hujusmodi, contra formam statuti. But the act of 5 Edw. 6, hath made corne, graine, &c. to be victuall within that act. *Vide* Vet. N. B. 2, part 23, b. stat. de pistor., braceator., et aliis victelariis, 34 Edw. 1.

“It was upon conference and mature deliberation resolved by all the justices, that any merchant, subject or stranger, bringing victuals or merchandize into this realme, may sell them in grosse; but that vendee cannot sell them again in grosse, for then he is an ingrosser according to the nature of the word, for that he buy ingrosse, and sell ingrosse, and may be indicted thereof at the common law, as for an offense that is *malum in se*. 2. That no merchant or any other may buy within the realme any victuall or other merchandize in gross, and sell the same in gross again, for then he is an ingrosser, and punishable, *ut supra*; for by this means the prices of victuals and other merchandize shall be enhanced, to the grievance of the subject; for the more hands they passe through, the dearer

they grow, for every one thirsteth after gaine, *vitiosum sitiunt lucrum*. And if these things were lawful, a rich man might ingross into his hands all a commodity, and sell the same at what price he will. And every practice or device by act, conspiracy, words or newes, to inhance the price of victuals or other merchandize, was punishable by law; and they relied upon the statute aforesaid, *nullus forstallarius, &c.*, which see before in this chapter; and that the name of an ingrosser in the reigne of H. 3 and E. 1 was not known, but comprehended within this word (*forstallarius*) *lucrum sitiens vitiosum*; and ingrossing is a branch of forestalling. And for that *forstallarius* was *pauperum depressor, et totius communitatis et patrie publicus inimicus*, he was punishable by the common law. They had also in consideration the book in 43 Aff., where it was presented, that a Lombard did procure to promote and inhance the price of merchandize, and shewed how; the Lombard demanded judgment of the presentment for two causes. 1. That it did not sound in forestalling. 2. That of his endeavour or attempt by words, no evill was put in use, (that is) no price was enhanced, *et non allocatur*, and thereupon he pleaded not guilty: whereby it appeareth, that the attempt by words to inhance the price of merchandize was punishable by law, and did sound in forestalment; and it appeareth by the book that the punishment was by fine and ransome. And in that case Knivet reported, that certaine people (and named their names) came to Coteswold in Here-

to go hopelessly wrong and contrary to the true interests of mankind in all matters pertaining to commercial and industrial intercourse. It may even be said that in all interferences with the freedom of commercial and industrial intercourse the error of the legislature or the court may be measured by the strenuousness of the language employed—the more sweeping, the more dogmatic, the decrees, assertions and assumptions concerning offenses such as regrating, forestalling and engrossing, the more certain they are to prove wrong and to soon give way to more enlightened policies. It is ever darkest just before the dawn—of reason, and men are never so sure they are right as when on the eve of discovering their error. The atmosphere of unrest and doubt arouses the spirit of dogmatic affirmation.

§ 38. There has never been a moment in the world's history when men have not been wrong on matters and measures relating to trade and commerce—to trade and commerce especially, for trade and commerce vitally affect the pocket, and the pocket ever interferes with right reasoning and just conclusions.

There has never been a moment in the world's history when men have been wholly and finally right regarding any matter relating to trade or commerce, otherwise evolution is not a force and progress a myth.

The errors of distant generations are so clear to us they seem positively ludicrous; the errors of nearer generations are not so clear; our own errors are seldom perceived at all; and yet nothing is more certain than that the twenty-first century will look upon most of our pet theories, measures and customs with the same surprise and amused indulgence that we entertain for the theories, measures and customs of the seventeenth century. Laws restricting freedom of trade and contract framed to-day with all the sobriety of earnest conviction are as certain to be repealed and looked back to with amazement and wonder as was the solemn law of Edward VI. against regrating, forestalling and engrossing, and many other similar statutes. Decisions

fordshire, and said in deceit of the people, that there were such wars beyond the seas, as no wooll could passe or be carried beyond sea, whereby the price of wools was abated; and upon presentment hereof made, they appeared; and upon their confession they were put to fine and ransome. See the statute of 25 H. 8, cap. 2, whereby the lords of the council, justices, &c. or any seven of them, &c. have power to set prices on victuals, and the same to be proclaimed under the great seale."

rendered to-day with all the assurance of infinite certainty will soon be referred to as among the curiosities of jurisprudence. All this is not necessarily to the discredit of either legislatures or courts, for they are but human and can only move with the currents of progress. Along the same lines, though of course not under the same conditions, the present generation must make as many mistakes and do things just as absurd as any preceding generation. History shows that every generation has its follies — ours can be no exception; but history shows more, it discloses the tendencies of things, the lines of progress; so plain are these lines, so constant are these tendencies, that once discovered they are recognized as forces.

In trade and commerce the tendency disclosed by even the most casual reference to the history of legislation and jurisprudence is toward greater and greater freedom for the individual and less and less interference on the part of the state.

§ 39. The practical application.—The history of the law concerning the ancient offenses of regrating, forestalling and engrossing—the rise and fall of that law—is of immediate interest in connection with the law governing “corners,” so called, and “option contracts;” and is also of interest as being inextricably interwoven in the law of combinations by a long line of decisions. Not that regrating, forestalling or engrossing has any necessary connection with combinations, but the ancient decisions against those offenses are pressed into service against modern combinations. How far, if at all, these early decisions are applicable can be ascertained only by investigating the development of the law.

§ 40. The offenses at common law.—It has been a matter of doubt to what extent regrating, forestalling and engrossing were offenses at the common law prior to the act of Edward VI.¹ The preamble of the act referred to begins as follows:

“Albeit divers good statutes heretofore have been made against forestallers of merchandises and victuals, yet for that good laws and statutes against regrators and ingrossers of the same things have not been heretofore sufficiently made and provided, and also for that it hath not been perfectly known what person should be taken for a forestaller, regrator or in-

¹Stats. at Large, 7 Edw. VI., vol. 5, ch. 14.

grosser, the said statutes have not taken good effect, according to the minds of the makers thereof."

From this section of the preamble it would seem that the offenses were recognized prior to the enactment of this law. Lord Kenyon was clearly of the opinion that the offenses were recognized by the common law, for long after the statute of Edward VI. was specifically repealed he continued to enforce the common law and convict offenders.¹

§ 41. Statute of Edward VI.—In the reign of Edward VI. parliament passed an act against regrators, forestallers and engrossers which not only defined the offenses, but established severe penalties against the same.²

§ 42. Regrating under the statute.—Regarding the offense of regrating the statute provided, "That whatsoever person or persons that after the said first day of May shall by any means regrate, obtain or get into his or their hands or possession, in any fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market within this realm or Wales to be sold, and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be accepted, reputed and taken for a regrator or regrators."

§ 43. Elements of the offense of regrating.—Under the statute the offense of regrating is confined to the necessities of life named in the foregoing section, and the essential element of the offense is the buying up of the products named after they are brought to market and the selling of the same again in the same market or in any market within four miles thereof. The obvious intent of this section of the statute is to shut out the intervention of all middlemen. It is an attempt to bring the consumer directly into contact with the producer, and the statute is directed towards agricultural and food products. The middleman or dealer is permitted to buy the products enumerated, provided they are resold beyond the four-mile limit.

¹ *Rex v. Busby* (1800), Peake's Add. Nisi Prius Cas. 189; *King v. Wadington* (1800), 1 East, 143. See also note to § 3C.

² *Stats. at Large*, 5 and 6 Edw. VI., ch. 14.

§ 44. Forestalling under the statute.—The statute provided, “That whatsoever person or persons that after the first day of May next coming shall buy, or cause to be bought, any merchandise, victual, or any other thing whatsoever, coming by land or by water toward any market or fair, to be sold in the same, or coming toward any city, port, haven, creek or road of this realm or Wales, from any ports beyond the sea, to be sold, (3) or make any bargain, contract or promise, for the having or buying of the same, or any part thereof so coming as aforesaid, before the said merchandise, victuals, or other things, shall be in the market, fair, city, port, haven, creek or road ready to be sold; (4) or shall make any motion by word, letter, message or otherwise, to any person or persons, for the enhancing of the price or dearer selling of any thing or things above mentioned, (5) or else dissuade, move or stir any person or persons coming to the market or the fair, to abstain or forbear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek or road to be sold as is aforesaid, (6) shall be deemed, taken and adjudged a forestaller.”

§ 45. Elements of the offense of forestalling.—It will be observed from a careful reading of the foregoing section of the statute that the offense of forestalling consists of:

1. The buying of anything coming by land or water towards any market to be sold therein.

2. Or the making of any contract for the buying or controlling anything coming towards a market before the merchandise or product shall be in the market ready to be sold.

3. Or the holding out of any inducement to any person for the enhancing of the price of anything coming to a market as aforesaid.

4. Or the persuading of any person coming to a market to abstain from bringing to the market products or merchandise to be sold.

It is apparent that the offense is confined to an interference with merchandise and products on their way to market.

§ 46. Engrossing under the statute.—Concerning the offense of engrossing the statute provided, “That whatsoever person or persons that after the said first day of May shall engross or get into his or their hands by buying, contracting or promise-taking, other than by demise, grant or lease of land or title,

any corn growing in the fields, or any corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed and taken an unlawful engrosser or engrossers."

§ 47. Elements of the offense of engrossing.—Whereas the offense of regrating was the buying with the intent to sell again certain products after they had reached a given market, the offense of engrossing was the buying or contracting for corn growing in the fields, or the prime necessities of life named in the foregoing section wherever they might be found, with the intent to sell the same again. In time the statute was held to embrace the engrossing of fish, butter and cheese, salt, straw and hay, oats, and wild fowl, but it was held that the statute did not cover apples, "no more than plums or other fruit which serveth more for delicacy than for necessary food," and it did not cover the engrossing of barley converted into malt, or corn converted into meal or starch.

The offense of regrating was not complete unless there was a purchase and a sale again of the regrated article, while the offense of engrossing was complete upon the purchasing of the product or the contracting for the same with the intent to sell the same again.

§ 48. The three offenses.—The three offenses of regrating, forestalling and engrossing attempt to cover broadly —

1. The purchase by middlemen of certain necessities of life on their way to market.

2. The purchase by middlemen of certain necessities of life which have already arrived in market, and the selling of the same again in the same market or within four miles thereof.

3. The buying or contracting for by middlemen of certain necessities of life while in the hands of the producers with the intent to sell the same again.

In short, the statute makes it a criminal offense for any person to either buy or contract for certain necessities of life while the same are in the hands of the producers with the intent to sell the same again, or while said necessities of life are on the way to market, or after they have reached the market.¹

¹The remaining sections of the act are of sufficient historical importance to warrant their being set forth in full in this note:

"IV. And if any person or persons shall at any time after the said first day of May offend in any of the things before recited, and being

§ 49. Additional attempts to restrict trade.— The act also attempts to restrict trade by providing that if any person, having sufficient corn and grain for his own necessities, do buy any additional corn in any fair or market, and do not bring to the

thereof duly convicted and attainted by the laws of this realm, or after the form hereafter mentioned, shall for his or their first offence have or suffer imprisonment for the space of two months without bail or mainprise, (2) and shall also lose and forfeit the value of the goods, cattle and victual so by him or them bought or had.

“V. And if any person lawfully convicted or attainted of or for any of the offences abovesaid, be thereof estsoons lawfully convicted or attainted, that then every person or persons so offending shall have and suffer for his or their said second offence, imprisonment by the space of one half year, without bail or mainprise, and shall lose double the value of all the goods, cattle and victual so by him bought or had, as is aforesaid.

“VI. And if any person being lawfully twice convicted or attainted of or for any of the said offences, shall estsoons offend the third time, and be thereof lawfully convicted or attainted, that then every such person for the said third offence shall be set on the pillory in the city, town or place, where he shall then dwell and inhabit, and lose and forfeit all the goods and cattle that he or they have to their own use, and also be committed to prison, there to remain during the king's majesty's pleasure.

“VII. Provided alway, and it is enacted and declared by the authority aforesaid, That the buying of any such barley, bigg or oats, as any person or persons (not forestalling) shall buy to convert into malt or oatmeal, in his or their own house or houses, and so shall be converted indeed;

(2) or the buying of any such thing by any such fishmonger, butcher or poulterer, as concerns his or their own faculty, craft or mystery, (otherwise than by forestalling) which shall sell the same again upon reasonable prices by retail; (3) or the taking of any cattle, corn, grain, butter, cheese, or any other thing above mentioned, reserved without fraud or covin upon any lease for term of life or lives, year or years, heretofore made or hereafter to be made; (4) or the buying of any wine or other dead victual above mentioned, being apt and meet for man's sustenance, by any innholder or other victualler, to sell the same by retail within his house, or to any of his neighbors for their sustenance, for reasonable prices; (5) or the buying of any dried or salted fish, herring or sprats (not forestalled) and sold for reasonable prices; (6) or the buying of any corn, fish, butter or cheese, by any such badger, lader, kidder or carrier, as shall be assigned and allowed to that office or doing, by three justices of the peace of the county where the said badger, lader, kidder or carrier shall dwell, which shall sell or deliver in open fair or market, (7) or to any other victualler, or to any other person or persons for the provision of his or their house or houses, all such corn, grain, butter and cheese, as any such person shall buy or cause to be bought, and that within one month next after he shall so buy any such corn, grain, butter or cheese, so that the same shall be bought without forestalling; (8) or else that any common provision made, or hereafter to be made, without any fraud or covin, by any person or persons, of any of the things

same market the same day as much corn as he shall buy, and sell the same at the market price, he shall forfeit double the value of the corn so bought. This permits a farmer to sell old seed and buy new if he desires to do so, but not to buy addi-

abovesaid, for any city, borough or town corporate, or for provision of victualling of any ship, castle or fort within the king's dominions, without forestalling, which shall be employed only to that use and purpose; (9) or the buying and providing of any of the victuals above mentioned, necessary and requisite for the furniture and provision of the inhabitants of Calais, Guisnes, and other the marches of the same, or of the town of Berwick, Holy Island, or the marches of England against Scotland, which without fraud or covin shall be transported and conveyed as soon as wind and weather may serve, to such of the places aforesaid for the which the same shall be so provided; (10) shall not be in any wise deemed, adjudged or taken any offence contrary to this act.

"VIII. And it is also further enacted by the authority aforesaid, That if any person or persons after the said first day of May next coming, having sufficient corn and grain for the provision of his or their own house or houses, and sowing of their grounds for one year, do buy any corn in any fair or market, for the change of his or their feed, and do not bring to the same fair or market the same day so much corn as he shall fortune to buy for his feed, and sell the same, if he can, as the price of corn then goeth in the said market or fair. That then every such person or persons so buying corn for feed, shall forfeit and lose the double value of the corn so bought.

"IX. Or if any person or persons after the said first day of May shall buy any manner of oxen, ronts, steers, kine, heifers, calves, sheep, lambs,

goats, or kids living, and sell the same again alive, unless he or they do keep and feed the same by the space of five weeks in his or their own houses, ground, ferm-ground, or else in such ground or grounds where he or they have the herbage or common of pasture by grant or prescription, That then every person or persons so buying and selling again, shall lose the double value of the cattle or things so bought and sold again: (2) the one moiety of all which forfeitures afore rehearsed shall be to the king, and the other moiety to him or them that will sue for the same in any of the king's courts of record, by bill, plaint, action of debt; in which bill, plaint, action or information, no wager of law, essoin or protection shall be admitted.

"X. Be it also further enacted by the authority aforesaid, That the justices of the peace in every county within this realm or Wales, at their quarter-sessions, shall have full power and authority by virtue of this act to enquire, hear and determine all and every the defaults and offences perpetrated, committed or done, contrary to this act, within the county where any such sessions shall be kept, by inquisition, presentment, bill, or information before them exhibited, and by examination of two lawful witnesses, or by any of the same ways or means by the discretion of the said justices, (2) and to make process thereupon, as though they were indicted before them by inquisition, or by verdict of xii. men or more; (3) and upon the conviction of the offender by information or suit of any other than the king, to make extracts of the one moiety of

tional seed or grain without on the same day selling an equal amount of old.

Again, it is made an offense to buy live-stock and sell the same again alive, unless the purchaser keeps and feeds the same

the forfeitures to be levied to the king's use, as they use to do of other fines, issues and amerciaments grown in the sessions of peace, (4) and to award execution of the other moiety for the complainant or informer against the offender, by *fleri facias* or *capias*, as the king's justices at Westminster may do and use to do: (5) and if any such conviction or attainder shall hereafter happen to be at the king's suit only, that then the whole forfeitures to be extracted and levied to the king's use only.

"XI. And it is further enacted by the authority aforesaid, That whatsoever person shall at any time hereafter be punished by virtue of this act for any thing mentioned in this act, that then the same person shall not otherwise be vexed, troubled, sued or put to any pain or punishment for that thing wherefore he or they shall have been so punished.

"XII. Provided always, and it is enacted by the authority aforesaid, That it shall be lawful to every person or persons, which shall be assigned and allowed by three justices of the peace of the county where he shall dwell thereunto, to buy (otherwise than by forestalling) corn, grain or cattle to be transported or carried by water from any port or place within this realm or Wales, unto any other port or place within the said realm or dominions, if he or they shall without fraud or covin ship or embark within three score days next after he or they shall have bought the same, or taken covenant or promise for the buying thereof, and with such expedition and diligence as wind and weather will serve, to carry and transport the same to such

port or place as his or their cockets shall declare, and there do disembark, unlade and sell the same, and do bring a true certificate thereof from one justice of the peace of the county of, or mayor or bailiff of the town corporate, where the same shall be unladen, and also of the customer of the port where such unlading shall be, of the place and day where the said corn or cattle shall be disembarked, unladen and sold, to be directed unto the customer and comptroller of the port where the same were embarked; any thing mentioned in this act to the contrary notwithstanding.

"XIII. And over that, that at all times hereafter, when wheat shall be commonly at the price of vj. s. viij. d. the quarter or under, (2) malt and barley at iiij. s. iiij. d. the quarter or under (3) oats or oats malted, at the price of ij. s. the quarter or under (4) peas or beans at the price of iiij. s. the quarter or under, (5) and rye or misteline at the price of v. s. the quarter or under; (6) (all which quarters shall be intended to be of London measure) (7) that then it shall be lawful to every person and persons (not forestalling) to buy, engross and keep in his or their granaries or houses, such corn of the kinds aforesaid, as without fraud or covin shall be bought at or under the prices afore expressed; any thing in this act to the contrary notwithstanding.

"XIV. Provided always, and be it enacted by the authority aforesaid, That this act, or anything therein contained, extend not to charge any person or persons for any the offences above mentioned, unless he or they be sued for the same within two

for at least five weeks. However, three justices of the peace may grant permission to any person to buy corn, grain or cattle to be transported by water from one port in the realm to some other port or place, provided the shipment is made within sixty days after the purchase; the shipper must bring back a certificate from a justice of the peace at the point of destination showing the place and day of the unloading and selling of the corn or cattle.

§ 50. Regrating and engrossing of leather.—A special statute was passed against the regrating and engrossing of tanned leather, which provided that no person shall buy or engross any kind of tanned leather with the intent to sell the same again, upon pain of forfeiting said leather or the just price thereof.¹

years next after such offence done or committed. This act to endure until the end of the next parliament.

“XV. Provided always, and be it enacted by the authority aforesaid, That it shall be lawful to all and every of the king's majesty's subjects now dwelling or inhabiting, or that hereafter shall dwell or inhabit, within one mile of the main sea, to buy all manner of fish, fresh or salted (not forestalling the same) and to sell the same again at reasonable prices; this act or any thing therein contained to the contrary in any wise notwithstanding.

“XVI. Provided also, and be it enacted by the authority aforesaid, That it shall be lawful to all and every person and persons, known for a common drover or drovers, being licensed, authorized and allowed in writing, by three justices of the peace, whereof one to be of the quorum, of the county or counties where the same drover or drovers shall be most abiding and dwelling, to buy cattle in any such shires or counties where drovers have been wont in times past accustomedly to buy cattle, at their free liberty and pleasure, and to sell the same as is aforesaid, at reasonable prices, in common fairs and markets distant from the place or places

where he or they shall buy the same forty miles at the least, so that the same cattle be not bought by way of forestalling; this act or anything therein contained to the contrary in any wise notwithstanding.

“XVII. Provided, always, That such license of justices of the peace shall not endure above one year, unless the same be yearly renewed by so many justices as is aforesaid.” Made perpetual by 13 Eliz., c. 25.

¹An act against regrators and engrossers of tanned leather,—Stats. at Large, 7 Edw. VI., vol. 5, ch. 15. The preamble and first section of this statute are as follows:

“Where by the covetousness of divers greedy persons, regrating and engrossing all kinds of tanned leather into their hands, and selling the same again at excessive prices to sadlers, girdlers, cord-wainers, and such other artificers and handicraftsmen as make wares of tanned leather, the king's loving subjects are enforced to buy the said wares at unreasonable prices; (2) for remedy and reformation whereof, be it enacted by the king our sovereign lord, with the assent of the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same,

§ 51. **Confined to necessities of life.**—It should be specially noted that the statute of Edward VI. covers only prime necessities of life, and while, as already shown, the cases that subsequently arose somewhat extended the enumeration of the articles covered by the act, at no time was the act ever held to embrace other than the essential necessities of life. So far as the statute goes it contains no warrant for the proposition that either at common law or by statute was it an offense to regrate, forestall or engross articles and products other than such necessities of life. The act being penal in its nature and subject to strict construction, it is, of course, a legitimate inference that all articles of merchandise and products not fairly covered by the act may be handled and dealt in without restriction. The fact that parliament the year following enacted a law specially directed against the engrossing of tanned leather tends to show that it was not an offense to engross articles other than those specifically covered by the acts.

§ 52. **The policy of the act.**—Without an actual perusal of this extraordinary statute, few men of the present day and generation would believe that such a law could ever have been enacted by Englishmen of days so comparatively recent as those of Edward VI.¹

That from and after the first day of May next coming, no person or persons, of what estate, degree or condition soever he or they be, shall buy or engross, or cause to be bought or engrossed, any kind of tanned leather, to the intent to sell the same again, (3) upon pain to forfeit the said leather so bought or the just price thereof; the one moiety of which forfeiture shall be to the king our sovereign lord, and the other moiety to him or them that shall seise or sue for the same in any of the king's courts of record by action of debt, bill, plaint, information or otherwise, wherein no wager of law, essoin, protection or injunction shall be admitted or allowed for the defendant."

¹ Adam Smith, in his "Wealth of Nations," published in 1776, speaks as follows of the statute:

"Our ancestors seem to have imagined that the people would buy their corn cheaper of the farmer than of the corn merchant, who, they were afraid, would require, over and above the price which he had paid to the farmer, an exorbitant profit to himself. They endeavored, therefore, to annihilate his trade altogether. They even endeavored to hinder as much as possible any middlemen of any kind from coming in between the grower and the consumer." (Wealth of Nations, book iv, ch. 5, ed. 1880, at p. 105.)

"The statute of Edward VI., therefore, by prohibiting as much as possible any middleman from coming in between the grower and the consumer, endeavored to annihilate a trade, of which the free exercise is not only the best palliative of the inconveniences of a dearth, but the

It was a puerile attempt to control the laws of trade and to regulate the prices of the necessities of life. The attempt was no doubt disinterested and well meant, but futile, and in its effects more or less pernicious. The futility, not to say absurdity, of such laws as the statute of Edward VI. is widely recognized to-day; and yet not a year passes but laws of a kindred nature are passed in this country; laws which have not only a logical connection with, but an intimate relation to, the act against regrating, forestalling and engrossing. Attempts are still made to suppress the normal inclinations of men and the natural course of trade, and to regulate both according to the superior wisdom of legislative bodies. Unhappily many of the modern statutes restricting the freedom of trade and commercial intercourse are by no means so disinterested and honestly meant as the act of Edward VI. Fortunate indeed is the public of to-day if a sweeping enactment, ostensibly for the sole benefit of the public, is not founded upon selfish considerations and fathered by sinister motives.

§ 53. Repealing act of 12 George III.—By this act parliament sought to repeal all existing statutes relating to the offenses of regrating, forestalling and engrossing. The preamble of this act recites:

“Whereas it hath been found by experience that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth, and to enhance the price of the same; which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom; and in particular upon those of the cities of London and Westminster.”¹

best preventative of the calamity; and with the advice and consent of the lords spiritual and temporal, and after the trade of the farmer, no trade contributing so much to the commons, in this present parliament growing of the corn as that of the assembled, and by the authority of the corn merchant.” (Wealth of Nations, book iv, ch. 5, ed. 1880, at the same, That an act made in p. 109.) the third and fourth year of King Edward the Sixth, instituted, An act

¹The enacting clauses of the act are as follows: for the buying and selling of butter and cheese; and also an act, made

“Be it therefore enacted by the king’s most excellent majesty, by in the fifth and sixth year of King Edward the Sixth, instituted, An act

§ 54. Courts continue to enforce common law.—Notwithstanding the broad terms and the obvious intent of the repealing act of 12 George III., the courts, under the lead of Lord Kenyon, continued to hold that regrating, forestalling and engrossing were offenses at the common law.

§ 55. Lord Kenyon in *Rex v. Busby*.¹—This was a case at common law for regrating thirty quarters of oats. In the course of the trial Lord Kenyon made the following remarks concerning the strictures of Adam Smith upon the ancient law against regrating:

“Speculation has said that the fear of such an offense is ridiculous; and a very learned man, a good writer, has said you might as well fear witchcraft. I wish Dr. Adam Smith had lived to hear the evidence of to-day, and then he would have seen whether such an offense exists, and whether it is to be dreaded. If he had been told that cattle and corn were brought to market, and then bought by a man whose purse happened to be longer than his neighbor’s, so that the poor man who walks the street and earns his daily bread by his

against regrators, forestallers, and engrossers; and also an act made in the third year of Phillip and Mary, instituted, An act for the keeping of milch kine, and for breeding and rearing of calves; and also an act, made in the fifth year of Queen Elizabeth, instituted, An act touching badgers of corn, and drovers of cattle, to be licensed; and also an act made in the fifteenth year of King Charles the Second, instituted, An act to prevent the selling of live fat cattle by butchers; and so much of an act, made in the fifth year of Queen Anne, instituted, An act for continuing the laws therein mentioned relating to the poor, and to the buying and selling of cattle in Smithfield, and for suppressing of piracy, as relates to butchers selling cattle alive or dead within the cities of London and Westminster, or within ten miles thereof; and all the acts made for the better enforcement of the same, being detrimental to

the supply of the laboring and manufacturing poor of this kingdom, shall be and the same are hereby declared to be repealed.

“II. And be it further enacted by the authority aforesaid, That all informations, indictments, suits, or prosecutions, already commenced, for the inflicting any punishment, or for the recovery of any fine, penalty or forfeiture, under the said former acts, or any of them, shall cease and determine; and no further proceedings shall be had thereupon; and that no information, indictment, suit or prosecution, shall be commenced or prosecuted against any person or persons whatsoever, under or by virtue of the said acts, or any of them; but that all such proceedings shall be void, and of no effect; any law, statute, or usage to the contrary notwithstanding.” (12 Geo. III., c. 71.)

¹ Peake’s Add. Nisi Prius Cas. 189 (1800).

daily labor could get none but through his hands, and at the price he chose to demand; that it had been raised 3d., 6d., 9d., 1s., 2s., and more a quarter on the same day,—would he have said there was no danger from such an offense?"

§ 56. This case of *Rex v. Busby* has more than a passing interest, for in it Lord Kenyon, while conceding that the statute of 12 George III. repealed all existing statutes relating to regrating, contended that regrating was a crime at common law. It is apparent from his charge to the jury that his views concerning the principles of political economy were no more enlightened than the views of the generations which preceded the publication of Adam Smith's *Wealth of Nations*.¹

¹ Lord Kenyon charged the jury in the following words: "This cause presents itself to your notice on behalf of all ranks, rich and poor, but more especially the latter. Though in a state of society some must have greater comforts and luxuries than others, yet all should have the necessities of life; and if the poor cannot exist, in vain may the rich look for happiness and prosperity. The legislature is never so well employed as when they look to the interests of those who are at a distance from them in the ranks of society. It is their duty to do so; religion calls for it; humanity calls for it; and if there are hearts who are not awake to either of those feelings, then our interests would dictate it. The law has not been disputed; for though in an evil hour all the statutes which had been existing above a century were at one blow repealed,"—and here he dealt a vicious blow at 12 Geo. III., cap. 71, repealing some restraints on trade—"yet, thank God, the provisions of the common law were not destroyed. The common law, though not to be found in the written records of the realm, has long been well known. It is coeval with civilized society itself, and was formed from time to time by the wisdom of man. Good sense did not come in with the Conquest

or at any other one time, but grew and increased from time to time with the wisdom of mankind. Even amongst the laws of the Saxons are to be found many wise provisions against forestalling and offenses of this kind, and those laws laid the foundation of our common law. That it remains an offense, nobody has controverted. . . ."

After the fling at Adam Smith quoted in the text, he complimented the jury: "We are not monks and recluses, but come from a class in society that, I hope and believe, gives us opportunities of seeing as much of the world, and that has as much virtue amongst its members, as any other, however elevated;" and then closed by quoting a public rumor: "It has been said that in one county, I will not name it, a rich man has placed his emissaries to buy up all the butter coming to the market; if such a fact does exist, and the poor of that neighborhood cannot get the necessities of life, the event of your verdict may be highly useful to the public."

It is not surprising that after this tirade the jury found the accused guilty, but, though convicted, Rusby did not suffer the penalty imposed, for the upper court was equally divided in opinion as to whether re-

§ 57. *King v. Wadington*.— In this case the defendant was charged with spreading rumors — with intent to enhance the price of hops — in the hearing of hop planters, dealers and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, etc., with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price. And generally with spreading rumors with intent to enhance the price of hops, and with engrossing large quantities of hops with intent to resell the same for an unreasonable profit, and with getting control of quantities of hops with intent to prevent the same being brought to market. The defendant was convicted, and in arrest of judgment his counsel urged that the facts charged never constituted any offense, even previous to the repealing statute of 12 George III.; and even if they did, the offenses were done away with by that statute. The motion was overruled, Lord Kenyon holding that the acts complained of constituted offenses at common law ¹

grating was or was not a common-law offense.

¹ In his decision Lord Kenyon was very severe on all who attempted to control the market. "It has been said that if practices such as those with which this defendant stands charged are to be deemed criminal and punishable, the metropolis would be starved, as it could not be supplied by any other means. I by no means subscribe to that position. I know not whether it be supplied from day to day, from week to week, or how otherwise; but this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole or a considerable part of the produce from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude; and I am warranted in saying that it is a most heinous offense against religion and morality, and

against the established law of the country. That our law books do declare practices of the sort with which the defendant is charged to be offenses at common law cannot be denied. But it has been argued that the statute of Edward VI. against regrators, forestallers and engrossers, having declared what the common law was, and it having been determined that hops was not a victual within that act, therefore the engrossing of hops was never an offense at common law, not being considered as a necessary of life. But it is not difficult to expose the fallacy of such reasoning as applied to the times in which we live. When fairly considered, no two cases can be more unlike. It was not long before that determination was made that hops were considered as a noxious weed, and consequently could not, under such circumstances, be considered as falling within the meaning of the law. But times went on and things change; what was formerly con-

§ 58. Repealing act of 1844.— Inasmuch as the courts, under the lead of Lord Kenyon, were practically disregarding the repealing act of George III., and were holding that regrating, forestalling and engrossing were offenses at common law, parliament on the 4th day of July, 1844,¹ passed a general repealing act, the preamble of which definitely declared the public policy of England.²

sidered as poisonous is now become a common necessary of life. This instance is not singular; broom was formerly used as a bitter, which is now exploded. And it is but lately that the county of Kent was up in arms against the brewers for introducing quaffia instead of hops into their beer, alleging its detrimental qualities to the health of the public, although we find it introduced into the *materia medica* as a salutary bitter, approved by the whole college of physicians. So times and opinions alter. When hops were not a victual they were declared not to be within the scope of the law against monopolies; since they have become such they fall under a different consideration.”

¹ 7 and 8 Vic., ch. 24.

² The preamble is as follows: “Whereas divers statutes have been from time to time made in the parliaments of England, Scotland, Great Britain, and Ireland, respectively, prohibiting certain dealings in wares, victuals, merchandise, and various commodities, by the names of badgering, forestalling, regrating and engrossing, and subjecting to divers punishments, penalties, and forfeitures persons so dealing: And whereas it is expedient that such statutes, as well as certain other statutes made in hindrance and restraint of trade, be repealed: And whereas an act of the parliament of Great Britain was passed in the twelfth year of the reign of King George the Third, entitled ‘An act for repealing several

laws therein mentioned against badgers, engrossers, forestallers, and regrators, and for indemnifying persons against prosecutions for offenses committed against the said acts.’ whereby, after reciting that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth and to enhance the price of the same, which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and in particular upon those of the cities of London and Westminster, sundry acts therein mentioned, and all the acts made for the better enforcement of the same, were repealed, as being detrimental to the supply of the labouring and manufacturing poor of this kingdom: And whereas, notwithstanding the making of the first-recited act, persons are still liable to be prosecuted for badgering, engrossing, forestalling, and regrating, as being offenses at common law, and also forbidden by divers statutes made before the earliest of the statutes thereby repealed, For remedy thereof, and for the extension of the same remedy to Scotland and to Ireland, be it enacted by the queen’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by

§ 59. A sweeping reform.— This act of 1844 abolished in whole or in part eighteen restrictive English statutes, some ten Scotch statutes and eight Irish. As has been many times remarked, these early acts and the numerous decisions under them are illustrations of the truth that the laws of trade are superior to the laws of man. Both courts and legislative bodies may obstruct, embarrass and interfere with trade and commercial intercourse, but they cannot materially aid.

The repealing act of 1844 expressly provided that it should not apply to the offense of fraudulently spreading or conspiring to spread false rumors with intent to affect the prices of goods or merchandise, nor to the offense of wrongfully preventing, by force or threats, goods or merchandise being brought to market. In other words, regrating, forestalling and engrossing, if accompanied by fraud, remain offenses under the law — the element of fraud constituting the essential element of the offense.

§ 60. Summary of the law.— From a careful examination of the early authorities and statutes it may be stated in conclusion:

1. That regrating, forestalling and engrossing were offenses neither at common law nor by statute, except when certain articles of prime necessity were involved.

2. Aside from certain of the prime necessities of life it was not an offense to regrate, forestall or engross products and merchandise.

3. After the repealing act of 1844, regrating, forestalling and engrossing were no longer offenses in England unless made so by fraud.

4. The steady progress of English legislation and decisions has been toward greater freedom for the individual — freedom to trade as he pleases, his risk and his profit being his own.

§ 61. Regrating, forestalling and engrossing have no connection with monopolies.— An examination of the statute of Edward VI. shows that there was no connection whatsoever between the offenses of regrating, forestalling and engrossing and any attempt to secure a monopoly. As already shown, the term

the authority of the same, that after the passing of this act the several offenses of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and that no information, indictment, suit, or prosecution shall lie either at common law or by virtue of any statute, to be commenced or prosecuted against any person for or by reason of any of the said offenses or supposed offenses."

“monopoly” in those early days had a special significance, meaning a grant from the crown; but even using the term in its looser modern significance as meaning any attempt to “monopolize,” that is, to control the market for any given product, it is apparent that the offense of regrating, or of forestalling, or of engrossing, was complete, regardless of the extent of the transactions in the products dealt in. The ancient law assumed that any attempt to regrade, forestall or engross, even though the products involved were small in value, was attended with evil consequences to the public. It is important to keep these distinctions clearly in mind, for nothing is more common nowadays than to make indiscriminate reference to these early statutes and early decisions as declaratory of public policy and indicative in some manner of the law concerning modern monopolies, combinations and large commercial transactions.¹

§ 62. Freedom to contract.—The right to contract, to do business unhampered by restrictions and oppressive interferences, is an essential part of the right to “life, liberty and the pursuit of happiness,” said to belong to every man. Both courts and legislatures should be, and generally are, reluctant to interfere with the liberty of the individual to make contracts, even though the liberty is often exercised with consequences disastrous to the party and disadvantageous to the public. It is well settled that the individual can trade and contract freely, even to the extent of affecting or controlling the market, provided his contracts —

- (a) Are not tainted with fraud.
- (b) Are not against public policy.
- (c) Are not contrary to statute.

¹In *King v. Waddington*, *supra*, Lord Kenyon said: “Again it is urged that the quantity purchased cannot constitute the offense of engrossing, unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. This objection is new to me, but if the opinions of Lord Mansfield, Mr. Justice Dennison and Mr. Justice Foster are deserving of attention, there is as little in that objection as in the rest. I well re-

member an information moved for before them against certain persons for conspiring to monopolize or raise the price of all the salt at Droitwich. They had no doubt of its constituting an offense, although it was not pretended that these persons had endeavored to engross all or any considerable part of the salt in the kingdom. Nor was it questioned but that the monopolizing of salt was an offense at common law.”

§ 63. **Fraud.**—Fraud has been defined as “any cunning, deception or artifice used to circumvent, cheat or deceive another.”¹ Courts very wisely refuse to be bound by any definition of fraud, but the foregoing is broad enough to include all contracts into which the element of “cunning used to circumvent, cheat or deceive” enters; and it will be found that many contracts, agreements and combinations which have been condemned by the courts as contrary to public policy or as opposed to some statute more or less remotely applicable, in reality contained sufficient fraud — sufficient cunning used to deceive — to vitiate them. In fact it is difficult to conceive a contract contrary to public policy which is entirely free from fraud — entirely free from all cunning, deception or artifice. A contract that is perfectly fair, just and honest ought not to be contrary to public policy, even though the public is not a gainer therefrom.

§ 64. **Public policy.**—Public policy has been used as a mantle to cover a multitude of judicial sins. When no better reason is apparent, and the court is too indolent to search deep, a transaction is declared obnoxious to public policy. Beyond question public policy is a force and a factor, but it is a force of a judicial rather than a legislative character — it determines what is bad rather than defines; it is not declaratory like a statute, and reasons should be given for declaring an agreement contrary to public policy; it is contrary *because* it contains such and such obnoxious elements, elements of cunning, of deception, of oppression, as the case may be, and then it is contrary to public policy because cunning, deception and oppression are contrary to public policy. So long as the cunning, the deception or the oppression injures primarily certain individuals, the remedy may be left with them — it is simply a tort and the public is not concerned; but when the cunning, deception or oppression is directed toward the community at large and no one in particular, the courts invoke the doctrine of public policy; but they are simply getting at the elements of fraud or oppression which really vitiate the transaction and without which the transaction would be binding.

§ 65. In short, public policy — that “unruly horse” of Justice Burroughs² — is simply the force — in the absence of stat-

¹ 1 Story's Eq. Juris. (3d ed.), sec. 186. ² Richardson v. Mellish, 2 Bing. 229.

utes — which condemns cunning, deception, artifice and oppression when directed against the public welfare. Courts are too apt to denounce this or that transaction as contrary to public policy without searching to find the reason, when, if investigation were made, it would be found invariably that the transaction contained some of the elements referred to, or, if it did not, then it is not contrary to public or any other policy. The point may be made clear by saying that fraud upon an individual is contrary to “private policy,” while fraud against the public is contrary to “public policy” — the element of fraud, of cunning, of deception, of oppression, must be present.¹

¹ “All contracts in violation of morality, and founded upon considerations *contra bonos mores*, are void. All duties enjoined by the divine law are not enforced, indeed, by the common or statute law, not only because its forms and modes of proceeding do not enable it to adjust nice questions of morals, but because strict rules as to ethical questions would tend to destroy freedom of opinion and to afford opportunities for persecution. But no agreements to do acts forbidden by the law of God or which are manifestly in furtherance of immorality, and tend to contaminate the public mind, are tolerated, or can be enforced by the common law.” Story on Contracts, vol. 1 (5th ed.), pp. 644, 645.

“We now come to the third clause of illegal contracts, namely, contracts which violate the rules of public policy. The rule of law applicable to this class of cases is, that all agreements which contravene the public policy are void, whether they be in violation of law or of morals, or tend to interfere with those artificial rules which are supposed by the law to be beneficial to the interests of society, or obstruct the prospective objects following indirectly from some positive legal injunction or prohibition. Public policy is in its nature so uncertain and fluctuating,

varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes an established interest of society, it is void as being against public policy. The enlargement of the trade and the growth of cities, with the new and various relations created thereby, have rendered many species of contracts valid which were formerly considered to conflict with public policy. For instance, forestalling, which is the buying and contracting for any merchandise or victual on its way to the market, or dissuading persons from bringing their provisions there; regrating, which is the buying of corn or dead victual in any market, and reselling it within four miles of the place where it is bought; and engrossing, which is the purchasing of large quantities of dead victual or corn, to sell again, all of which were formerly considered to be against public policy, when trade was small, and money scarce, and markets few, constitute,

§ 66. Statute.— A statute is the legislative declaration of public policy, and is effective, as a rule, only in so far as it is an expression of a well-settled and conservative public policy. In so far as statutes are but the legislative expression of fleeting sentiment and prejudice, to that extent are they futile and inoperative. Statutes to be effective must be based on well-grounded public sentiment—on a sentiment which amounts to a morality; otherwise they are either dead letter or mischievous.

§ 67. Unfortunately both courts and legislatures mistake waves of sentiment, prejudice and passion for public policy, and condemn this or that as contrary to public policy because it is opposed to public clamor. This leads to statutes so comprehensive and wild in their terms that they are idle fulminations, and to opinions which are little better than screeds.

§ 68. A statute ought not to be directed against a perfectly harmless and innocent transaction. Unhappily, legislatures are so prolific with laws that many a statute is passed which in literal terms prohibits transactions entirely innocent and harmless. In interpreting such anomalous legislation, courts are compelled to resort to this rule and that rule of construction to get rid of the plain words of the act and apply it to only transactions which contain elements of wrong—wrong as against individuals or the public. Legislatures ought to be and courts must be opposed to all restrictions which hamper men in their ordinary pursuits, and it should ever be assumed that no legislature intends to prohibit that which is as innocent and harmless as most of the transactions of commercial life; it should ever be assumed that statutes and prior decisions—no matter what their literal words may be—are intended to cover only transactions containing some element of cunning, artifice, deception or oppression—some element injurious to either the individual or the public.

§ 69. Ancient statutes and decisions and public policy.— Again, courts, in ascertaining the public policy of the hour, are prone to review ancient statutes and decisions and hold

at the present day, great arteries of commerce, and are the very form and pressure of certain branches of trade. Indeed, without them what would become of wholesale commission merchants and jobbers?" Story on Contracts, vol. 1, pp. 649, 650.

that, because a transaction was contrary to public policy or contrary to the common law two centuries ago, it is contrary to public policy to-day. This is a fatal conclusion. The review of the growth of the law regarding the offenses of forestalling, regrating and engrossing shows how public sentiment changes. What were once crimes are now among the commonest of every-day transactions.

§ 70. **The final test of validity of both statute and public policy.**—Finally, the test of validity of both statute and public policy is the wrong that is condemned. There must be an injury, actual or threatened, to individual or public before the transaction under investigation can be pronounced contrary to either statute or public policy. The wrong is the gist of the whole matter, and this wrong—this threatened injury to the well-being of society—must be of a very tangible character, not vague or speculative. Under English and American institutions the individual is given the largest possible liberty—liberty to waste and dissipate his own resources; to trade and bargain so as to often acquire in a single venture the entire resources of another; and even to so conduct his business as to extort large sums from the public at large,—all these things and more may be done, experience having taught the Anglo-Saxon race that those who overreach, who attempt too much, who do business contrary to morals and public sentiment, as a rule in the long run pay for their turpitude. Both the courts and the public are content to let men go their own way—short of things fraudulent, oppressive, wrongful—subject only to those immutable laws of evolution and social progress which sooner or later relentlessly suppress the wrong-doing and sustain the well-doing.

CHAPTER III.

"CORNERS."

- § 71. Application of ancient law of regrating, forestalling and engrossing to "corners."
- 72. A "corner" defined.
- 73-75. "Options" and "futures."
- 76-80. The gist of the offense of operating a "corner" is the conspiracy.
- 81, 82. The rule stated.
- 83. The law concerning contracts in restraint of trade has no application to "corners."
- 84. Rights of parties to combination to create a "corner."
- 85-87. "Corners" not confined to necessities of life.
- 88. Money advanced to operate a "corner" cannot be recovered back.
- 89. All parties participating are equally involved.
- 90, 91. Principal and agent.
- 92. Court of equity will investigate real nature of contract.

§ 71. **Application of the ancient law.**— Practically all there is left of the ancient law of regrating, forestalling and engrossing are the statutes and decisions against "corners." While the modern "corner" may include some of the elements of all three of the ancient offenses, it is perhaps more closely akin to the statutory offense of engrossing than to the offenses of regrating and forestalling.

The ancient statutory offense of engrossing was confined to "buying, contracting or promise-taking . . . any corn growing in the fields, or any other corn or grain, etc., . . . to the intent to sell the same again." The ancient offense was complete whether committed by one person or by several in combination. The co-operation of several added nothing to the offense, but it is needless to say that the co-operation of several to commit the offense might make them guilty, not only of the offense of engrossing, but of the entirely distinct offense of conspiracy.

It is no longer either an offense or contrary to public policy to buy or contract for any of the articles named with intent to sell again; on the contrary, such dealing is directly encouraged; but it is held to be against public policy — if not an in-

dictable offense — for two or more to combine together for the purpose of “cornering” the market, and contracts and agreements creating such combinations will not be enforced.

The modern “corner” is therefore covered by the law governing conspiracies rather than by the ancient law and decisions concerning the offense of engrossing.

§ 72. A “corner” defined.—Broadly defined a “corner” is the securing of such control of the immediate supply of any product as to enable those operating the “corner” to arbitrarily advance the price of the product.¹

§ 73. “Options” and “futures.”—Ordinarily a “corner” is created by operations upon boards of trade or stock exchanges, and by dealings in “options” and “futures.”

§ 74. Modern facilities for transportation are so great that it is no longer possible to corner a market by playing upon the necessities of the people; it is no longer possible to secure such control of any necessary of life that the wants of the people will quickly and sharply advance the price in the usual and ordinary course of trade. Notwithstanding the enormous consumption of staple food products, such as wheat, corn and pork, it would be impossible for any conceivable combination of individuals to secure such a control of the entire available supply of any one of these products as to arbitrarily advance prices under normal conditions. The facilities for transportation are such that the supplies of distant states, territories and even of foreign countries are available to fill any normal demand, and the capital that would be required for conducting a “corner” under normal conditions would be vastly beyond the resources of any combination of individuals. It is therefore necessary to not only secure control of the immediately available supply of the product that is to be cornered, but also at the same time to create an artificial demand. This artificial demand can be created only by buying from men who have nothing to deliver, and inducing them to agree to deliver by a certain day, under the rules of a stock exchange or a board of trade, something that they must go into the market to buy,

¹ “A corner is the monopolizing of the marketable supply of a stock or commodity through purchase for immediate or future delivery, generally by a secretly organized combination, for the purpose of raising the price.” Century Dictionary.

and then through the control of the immediate supply make it difficult or impossible for them to fill their contracts; the efforts of the latter to fill their contracts will run up the price of the product to whatever point the “corner,” if successful, may dictate.

§ 75. The combination that is operating the corner must be prepared to buy and pay for all the particular product that is actually offered by parties controlling and holding the same, and in addition thereto the combination must be prepared to contract for all of the product that may be offered by parties who at the time of making contracts to deliver actually hold and control none of the product, but who expect to buy in the market sufficient to fill their contracts before the day fixed for delivery. If the combination is strong enough to take all the product that is actually offered, and all the contracts for future delivery that are offered, it will make it impossible for the sellers of futures to fill their contracts, whereupon all who have contracted to deliver something that they cannot deliver will be obliged to settle on such terms as the “corner” dictates.¹

¹ The machinery of a “corner” is detailed in the following from *Ex parte Young* (1874), 6 Biss. 58:

“Blodgett, J.: It appears from the testimony submitted with the register’s report that in the month of May, 1872, and for several years prior thereto, the bankrupts, Peyton R. Chandler and the firm of Chandler, Pomeroy & Co., were engaged in the business of buying and selling grain on the Chicago market, and as members of the board of trade of this city; that Chandler, Pomeroy & Co. were brokers and commission merchants, and Peyton R. Chandler dealt mainly on his own account as a capitalist through Chandler, Pomeroy & Co., who acted as his brokers; that about the middle of May, Peyton R. Chandler conceived the idea of making a corner in oats for the month of June then ensuing, and with that view he purchased all the ‘cash oats’ as they arrived in the market, and took all the ‘options’ offered

him for June delivery,—his purpose being to own all the oats in the market and compel those who had sold ‘options’ for June to pay his price; or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options and the price he should establish for cash oats on the last day of June, when his options matured. In pursuance of this plan he purchased, between the 15th of May and the 18th of June, 2,500,000 bushels of cash oats, being all, or substantially all, the cash oats on the market, and also bought June ‘options’ to the amount of 2,939,400 bushels. The total amount of oats in store in this city on the 18th of June was only 2,700,000 bushels, from which it will be seen that Chandler practically controlled the market up to that time, and the total amount received during the remainder of the month was only 800,000 bushels. As incidental to and part of the ma-

The law governing "options" and "futures" will be discussed in the next chapter.

§ 76. The gist of the offense of operating a "corner" is the conspiracy.—The gist of the offense of creating a "corner" is the conspiracy—the combining together of two or

chinery of this corner, Chandler also sold what are called 'puts,' or privileges of delivering to him oats during the month of June for forty-one cents a bushel.

"The proof shows conclusively that the plans of Chandler, and the fact that he was manipulating the market with express reference to a corner in oats for June, were well known and understood on the board of trade, while the number of these 'put' claims, about one hundred and twenty-five, all, or substantially all, in favor of members of the board, show that the struggle between Chandler, who was endeavoring to hold up prices, and the sellers of 'options' and holders of 'puts,' who were endeavoring to break the price, was quite generally participated in by members of the board. In other words, it was notorious that Chandler was endeavoring to keep the price at forty-one cents or upwards, while the sellers of 'options' and holders of 'puts' were endeavoring to break down the price. It is true that in this testimony some of the claimants say there was no 'corner,' or that they did not know that there was a corner; but the cross-examination shows that they knew Chandler was trying to make a corner, and they say he did not do it because he failed before the end of the month, so that by their own admission they knew what he was attempting—knew the reasons for his purchase of such large quantities of 'cash oats' and options, and knew he did not sustain his corner because the 'short interest broke him down;' and the moment a man bought a

'put,' he became identified with the short interest—his interests were antagonistic to Chandler. . . .

"It is as manifestly a bet upon the future price of the grain in question as any which could be made upon the speed of a horse or the turn of a card. The evidence in this case shows that in nearly all cases of settlements on 'put' or 'option' contracts the grain is never delivered, nor expected to be delivered, but the parties simply pay the difference as settled by the prices. But, if that were not so in all cases, it is clear that in this case no delivery of the grain was intended by these 'put' holders, because they knew that Chandler controlled all the oats in the market and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. Some of them say that they intended to deliver the oats, but it is absurd to suppose that they intended to deliver, unless they could do so for less than forty-one cents. They intended to deliver if they could break Chandler, or prevent his 'corner' from culminating, as the jockey may intend to walk his own horse over the course after he has poisoned or lamed that of his competitor. They did not intend to deliver if Chandler succeeded. Thus, a struggle inevitably ensued between Chandler and the holders of this immense amount of 'puts' and 'options;' Chandler alone on one side attempting to hold up the price and all the rest seeking to put it down. The fact that the sellers of options and holders of puts

more to do that which is fraudulent, or is injurious and oppressive to third parties or the public. An individual may buy or contract in good faith for as much of any product as his resources will permit, even though he secures the entire avail-

were able to get resolutions through the board of trade making new warehouses, where oats had never been stored before, 'regular' for the performance of these contracts, shows the intensity of the contest and the overwhelming influences with which Chandler had to contend. I do not mean to be understood as saying that the fact that Chandler sold 'puts' to so many as to create an overwhelming opposition makes the transaction any more or less a wager than if he had only sold one 'put,' but it shows the notoriety of the whole proceedings.

"From the very nature of the transaction the interest of the holder of the 'put' is to break down the price, and that of the seller to maintain it. The number engaged in this transaction, and the quantities involved, demonstrate that neither party expected any grain to be delivered. Chandler expected to hold up the price, in which event no grain would be offered him, and the other parties must have known they could not get the grain to deliver unless they first broke Chandler, as he held all the grain, and then, although they might tender, he could not receive, so that in reality no actual delivery was anticipated. They made their tenders only as a method of establishing differences after he had failed, and was powerless.

"That transactions of this kind are only wagers is abundantly established by authorities. . . .

"There is no dispute that contracts of wager are valid at common law, unless affected with some special cause of invalidity.

"But wagers which are contrary

to public policy have always been held by the courts to be essentially void without statutory prohibition, and cannot be made the ground of an action.

"And a high authority in the profession has stated the law on the subject of the validity of wagers with great force and clearness, when he says:

"'As the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interests of the community, and at variance with the laws of morality, the exception necessarily becomes the rule.'

"Indeed, any one rising from a full examination of the law applicable to wagers, as expounded by the courts, would undoubtedly testify that, while he has found in the books, and especially among the older text-writers and cases, general expressions to the effect that wagers were valid at common law, he has found the cases where they have been enforced to be extremely rare, and the courts have been astute to find reasons for not enforcing them. . . .

"But even if not within the letter or spirit of the statute of this state, the common-law authorities quoted show that all wagers contrary to public policy are void without reference to any statute. And as the contracts under consideration are essentially nothing but bets upon the price of oats in this market within the time limited, and as it is obvious that the effect of such transactions is to beget wild speculations, to derange prices, to make prices artificially high or low, as the interests, strength and skill of the manipula-

able supply and thereby creates in effect a "corner" — the law leaves him both the risk and the profit of his enterprise; but a combination between two or more to do exactly the same thing is held illegal.¹

§ 77. Neither an individual nor a combination can enforce option contracts or contracts for futures which are gambling contracts. A "corner" operated by an individual may be illegal because founded upon gambling contracts; a "corner" operated by a combination is illegal because it is a conspiracy, but it may also operate illegally by making gambling contracts.²

tors shall dictate, thereby tending to destroy healthy business and unsettle legitimate commerce, there can be no doubt of the injurious tendency of such contracts, and that they should be held void as against public policy. As is most cogently said by the learned judge who delivered the opinion in the case cited from 55 Pa. St.:

"Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another is gambling, and demoralizes the community, no matter by what name it may be called."

"The financial disaster and ruin which followed 'Black Friday' in New York, and the scarcely less damaging local consequences which followed the various 'corners' which have either succeeded or been attempted in this city, furnish conclusive proof, if proof were needed, that such gambling operations would be held void, as contrary to public policy."

¹ In *Rex v. Hilbers*, 2 Chitty, 163, it was held that there must be a combination of two or more persons before information will lie for enhancing the price of necessities of life. In *Rex v. De Berenger*, 3 M. & S. 68, parties of high rank were convicted of conspiring to raise the price of stocks by false rumors.

² The rule is stated by Greenhood as follows: "Combinations whose object is to create what are known as 'corners' in the market, or to control the traffic in any staple which is a popular necessity, or to enhance the price thereof, or to withhold the same from the market, or to prevent competition in the sale thereof, are void." Citing *Kountz v. Kirkpatrick*, 72 Pa. St. 376 (1872); *Kountz v. Citizens' Oil Refining Co.*, id. 392 (1872), Sharswood and Williams, JJ., dissenting. (Greenhood on Public Policy, ch. IV, rule DXLI p. 642.) See also *Sampson v. Shaw*, 101 Mass. 145; Rev. St. Ill., 1881, chs. 38, 130; *Lyon v. Culbertson*, 85 Ill. 33; *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. R. 525; *Coal Co. v. Coal Co.*, 64 Pa. St. 173; *Arnot v. Coal Co.*, 63 N. Y. 558; *Ex parte Young*, 6 Biss. 53, 65.

The case of *Wells v. McGeoch* (1888), 71 Wis. 196, 35 N. W. R. 769, turned in part upon a provision of the statutes of Wisconsin (see R. S. 4568), and it was urged in argument that "The agreement or conspiracy of Wells, McGeoch and others to corner the market in relation to wheat, and divide among them the profits which might be gained by means of such corner, being illegal, fraudulent and void, it follows that no action can be maintained by any party to such conspiracy against his as-

§ 78. It has been broadly held that all compacts between men, the object of which is to elevate or depress the market, are injurious to public interests and in restraint of trade, and such compacts are null and void.¹

sociates or either of them to enforce an accounting, contribution or division of profits, or for any other relief founded upon such agreement."

In this case the supreme court of Wisconsin said: "In addition to pleading the illegality of those deals as defenses to the action, McGeoch, through his counsel, has expressed to us, in strong and earnest language, the wrong and injustice and the enormity of the evils which necessarily result from such illegal transactions, and has also denounced them as crimes against the public. Also, counsel cited several cases in which, in most impressive language, the immorality and illegality of such transactions are asserted. We cordially indorse all that was said to us on that subject in the arguments, as well as the language of the courts to which our attention has been called. When we said in *Melchoir v. McCarty*, 31 Wis. 252, that 'all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statutes, are void; and that, if a party claiming a right to recover a debt is obliged to trace his title or right to the debt through any such illegal contract, he cannot recover, because he cannot be allowed to prove the illegal contract as the foundation for his right of recovery,' — we stated the rule as strongly as any court has stated it. To that rule this court has rigorously adhered. The rule is elementary, and we are not aware of any adjudication which has denied or shaken it. Numerous cases sustaining it will

be found in the brief of the learned counsel for McGeoch. It is unnecessary to cite them here, but reference to them will be made in the report of the case. Thus far we are in entire accord with McGeoch, his counsel and the learned county judge. We have no doubt the county court ruled correctly that the wheat deal of 1882 and the lard deal of 1883 were illegal transactions, under the statutes of the state of Illinois. They were also illegal at the common law, as against public policy."

¹ All compacts between merchants, speculators or any class of men to elevate or depress the market are injurious to the public interest and in restraint of trade. When such a purpose is apparent in a contract it strikes the agreement with nullity. Such a combination of dealers is nothing less than a conspiracy against trade, entered into for selfish purposes, and tending to make the poor poorer and the rich richer. . . . Such design will not be furthered by the courts. It makes no difference that the agreement is only in partial restraint of trade. If the public is injuriously affected (and that is necessarily so when the combination tends to increase the price of a commodity) it is illegal. A combination of several parties to enhance the price of corn, by making large purchases and preventing the fair selling thereof, whereby an immense lot of corn is put into the hands of a firm in the combine and thus force up the price of corn in the market, is contrary to public policy, and no party to the agreement can maintain an action for services growing out of the transaction. *Foss et al. v. Cummings et al.*

§ 79. It is obvious that this proposition is altogether too broad. It was laid down in a case wherein the corner was being conducted by dealing in options and futures, and the case was correctly decided without resorting to a proposition of law so sweeping as the foregoing.

(1894), 149 Ill. 853, 86 N. E. R. 553. The supreme court of Illinois said: "What, then, was this transaction; and if not an attempt to corner the market, was it in any way an unlawful undertaking?"

"It was clearly a combination to enhance the price of corn. The parties who entered into it had on hand, or had purchased, large amounts of corn. It is not pretended that they had any use or need for more; nevertheless, they entered into an agreement to purchase cash corn and May options, as the plaintiff Foss testifies, because by buying up the cash corn the market would advance. Other parties were also large holders of corn and they were brought into the arrangement; a combination was made not only to purchase corn, but to prevent the free selling thereof; all the immense amount of corn owned by these parties was put into the hands of the plaintiffs; they were to control all, and thus by united holding, united purchases, and no sales, save such as should be for the benefit and the interest of all, the market was to be controlled, the price of a staple commodity, one of the prime necessities of life, enhanced, and it was expected great gains would be made by the parties to the combination; while he who had corn to buy for food would be compelled to pay, not the price of a free market, but the sum to which, by such combination, such united holding and withholding, the market might be forced. . .

"It is manifest in the present case that the clear tendency of the acts of the parties was to unnaturally enhance the price of an article of

prime necessity; to create as to it an artificial scarcity, and to compel those whose necessities compelled them to buy, to pay, not the price determined by entire freedom of buyers and sellers, but the price to which their combination to buy and to withhold might be able to force the market.

"Such combination was clearly against public policy, and such conduct of a character that, if it be not now, under the common law as it existed a century and a half ago would have been a criminal offense. 4 Bl. Com., by Cooley, pp. 158-160; Bishop on Crim. Law, secs. 518-529; Salt Co. v. Guthrie, 85 Ohio St. 666; Morris Run Coal Co. v. Barolay Coal Co., 68 Pa. St. 173; People v. Fisher, 14 Wend. 9, 16, 18; Craft et al. v. McConoughy, 79 Ill. 846; Arnot & Pittson v. Elmira Coal Co., 68 N. Y. 565; Clancy v. Onondago Salt Mfg. Co., 62 Barb. 395.

"It is manifest that the means adopted were well calculated to effect the object aimed at, viz., to force corn up.

"Holding the great amount of corn the parties to this transaction did, with the scarcity of corn in the country, the purchase of all cash corn offered and of May options would tend not only to cause an unnatural rise, 'to force the price up,' but was quite likely to bring about a corner in May corn.

"With a scarcity of corn in the country, the direct tendency of this combination, not only to purchase such corn and May options, but to withhold from market the large amount of this grain controlled by

§ 80. There are few compacts between merchants and business men which do not tend directly or indirectly to elevate or depress the market. It is to the interest of all buyers to depress the market, and of all sellers to advance the market; and wherever two or more buyers are operating together the very object of their co-operation is to secure some advantage by directly or indirectly affecting the market in their favor; and wherever two or more sellers are operating together, the very object of their co-operation is to secure some advantage by affecting the market in their favor. It is by no means true that a compact between parties co-operating together is null and void, simply because the object of that compact is to serve the interest of those so co-operating by depressing or advancing the market. The test of the validity of a compact of co-operation is not whether it tends to elevate or depress or even control the market.

§ 81. **The rule stated.**—The true rule concerning combinations for the operation of a "corner" may be stated as follows: All contracts and undertakings in support of a combination, the object of which is to secure such control of the immediate supply of any commodity or product essential to the life or comfort of the community, as to enable the combination to arbitrarily control the prices of such product or commodity, are illegal and void.

§ 82. Before such contracts or undertakings can be held illegal and void it must clearly appear that they were entered into for the express purpose of forming such a combination as above described, for beyond any reasonable question it is entirely legitimate for two or more individuals to agree that they will co-operate together in buying all the wheat or corn or pork, or any other commodity that they can afford to buy. What one individual has the right to do in the normal course of trade, two or more individuals have the right to do; and if one man may, in the exercise of his own judgment, buy all that he can afford to buy of any given product in the belief that in the normal course of events the product is bound to advance in price, two or more men may do the same thing, and

these confederates, was injurious to the public and therefore void. *Craft v. Foss et al.* (May, 1891), 40 Ill. App. v. McConoughy, *supra*; *Homer v.* 523, 530, 531. Case affirmed (1894), *Neves*, 7 Bing. 743; *Com. v. Carlisle*, 149 Ill. 353, 359, 36 N. E. R. 553.

may enter into a compact to pool their resources and co-operate together in support of their conviction that the price of any particular commodity is sure to advance. It is only where such a combination is formed for the express purpose of arbitrarily and artificially advancing prices that all undertakings upon which the combination is based are null and void.

§ 83. Law concerning contracts in restraint of trade has no application.—The law governing contracts in restraint of trade has no application whatsoever to combinations formed for the purpose of cornering the market. In decisions holding such combinations illegal, propositions are frequently found to the effect that such combinations are illegal because in restraint of trade. As will more fully appear in a subsequent chapter, contracts in restraint of trade are confined within certain well-defined limits; but even were they not, it is far from accurate to say that the creating of a “corner” operates in any manner to restrain trade; on the contrary, all the operations leading up to a “corner,” and all the operations which follow the dissolution of a “corner,” tend to increase and stimulate trade abnormally and feverishly.

§ 84. Rights of parties to combination to create a corner.—No party to any agreement or undertaking providing for the formation of a combination to operate a “corner” can maintain an action for services growing out of any of the transactions of the combination.¹

§ 85. Not confined to necessities of life.—It is seldom that any attempt is made to create a “corner” in any commodity or product or stock that is not dealt in upon some board of trade or stock exchange, but the character of the product or commodity or stock is not the factor which determines the validity of the combination. Illegal combinations are not confined to necessities of life.

§ 86. Any combination the object of which is to force fictitious and unnatural advances in prices and oppress those whose necessities compel them to buy is unlawful. But most of the reported cases bearing directly on “corners” involve either food products or stocks.²

¹Foss et al. v. Cummings et al., Mich. 447, 9 N. E. R. 525. In this case the Michigan court said: “The *supra*.

²Raymond v. Leavitt (1881), 46 object of the arrangement between

§ 87. An agreement to buy up the control of the stock of a corporation, and to make purchases for future deliveries so as to create a "corner," is illegal, and the parties to such an agreement are not partners.¹

§ 88. Money advanced to operate a "corner" cannot be recovered back.— A party to a combination to create a "corner" who has advanced funds for the operation of the "corner" cannot recover back amounts actually expended by the combination according to the terms of the illegal agreement, but may recover whatever balance may remain unexpended in the treasury of the combination.²

these parties was to force a fictitious and unnatural rise in the wheat market for the express purpose of getting the advantage of dealers and purchasers, whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community is universally recognized. This alone may not be enough to make them illegal. But it is enough to make them so questionable that very little further is required to bring them within distinct legal prohibition. There is no doubt that modern ideas of trade have practically abrogated some common-law doctrines which are supposed to unduly hamper commerce. At the common law there is no doubt such transactions as were here contemplated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. Some of our states have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law of such cases. Where this has been done, as in New York, the statutes have replaced them by restraints on combinations for that

purpose, leaving individual action free. In England there have been several statutes narrowing or repealing all of the ancient statutes, and more recently covering the whole ground. But so long as the early statutes only were repealed, it was considered that enough remained of the common law to punish combinations to enhance values of commodities. And when this doctrine became narrowed, it seems to have been considered that such combinations to enhance the price of provisions remained under the ban."

¹ Sampson v. Shaw (1869), 101 Mass. 145.

² Sampson v. Shaw (1869), 101 Mass. 145. Upon other evidence offered by the defendant and admitted against the objection of the plaintiff, the auditor found that the plaintiff, the firm of Thaxter & Company, and John Richardson entered into an agreement to operate in the stock of the Malden & Melrose Horse Railway Company, for the purpose of getting "a corner," Thaxter & Company taking one-half and the plaintiff and Richardson each one-quarter interest in the operation; that the plan of operation was as follows: Thaxter & Company were to be the managers, and were to buy up a large quantity of the stock and control it in such a manner as to make a large

§ 89. All parties participating are equally involved.—All parties participating in an illegal combination with knowledge of its character, whether they participate as principals or agents, are alike guilty, and none can assert as against the others any right based upon the illegal transactions.¹

§ 90. Principal and agent.—An agent who is employed to assist his principal in an illegal combination cannot recover of his principal for service or for money advanced in the execution of the illegal object; nor can the principal recover of the agent money he has advanced the agent to be used by him in the prosecution of the illegal objects of the combination; nor can a principal recover of the agent moneys received by the agent in the course of his employment arising out of the illegal transactions.²

demand for it, so that parties selling on time would be compelled to pay large differences; Thaxter & Company were then to receive and make proposals and agreements thereon for the purchase of stock to be delivered at a future day, the parties agreeing to sell not then having the stock in possession or owning it, and then the sellers, when the day for delivery should arrive, would be compelled to pay such prices or differences as the parties to this combination might ask; the money to carry on the operation was to be furnished, and the profits or losses shared or borne, by the parties in proportion to their respective interests; that said stock at that time was of little, if any, intrinsic value, and was selling in the market for about five dollars per share; that Richardson paid in money from time to time, as called for, under the agreement, for carrying on the operations; that the plaintiff authorized Thaxter & Company to use his funds in their hands as far as necessary for the same purpose; that Thaxter did proceed to make purchases, and in so doing expended a large sum of money; that the operation in the Malden and Melrose stock was not successful; and that

the money invested therein was substantially lost, and no settlement or adjustment thereof had ever been made.

The auditor on this evidence ruled that the "agreement for operating was illegal and void; that the parties did not become copartners by force of the agreement or any acts done in pursuance thereof; and that the defendant could not set up said agreement or the acts done under it in answer to the plaintiff's claim." *Sampson v. Shaw, supra.*

¹*Samuels et al. v. Oliver et al.* (1889), 130 Ill. 73, 22 N. E. R. 499.

²*Samuels et al. v. Oliver et al., supra.* In this case the supreme court of Illinois said: "In the spring and summer of 1882, appellees undertook to run what is known as a 'corner' in No. 2 red winter wheat, in the St. Louis market, and for that purpose, and to aid them in bringing about that result, employed appellants and eight or nine other brokers of the city of St. Louis, and through these agencies secured contracts for the sale of large quantities of wheat, to be delivered on or before the last day of June, 1882, and aggregating about 1,100,000 bushels. At the same time, through these same agencies,

§ 91. But unless it appears from the evidence that the agent is either a party to the illegal combination, or had such knowledge of it that in the performance of his duties he, in a manner, participated in the combination, the agent may recover for

appellees bought up and secured substantially all of that grade of wheat actually in the market. By this means appellees were enabled to compel those whose contracts they held and had thus secured, for the delivery of wheat on or before the day named, to pay in settlement whatever price appellees might be able to fix as the market price, or might demand. . . . There is no serious question of the illegal purpose for which appellants were employed. It was to give appellees control of the wheat market. They employed a large number of brokers of the city to co-operate with appellants secretly, and to buy up all the wheat actually in market, and at the same time procure contracts for the sale and future delivery of large quantities of such wheat, which they knew could not be had in the market. The witness J. C. Ewald, at one time president of the Merchants' Exchange and a member of it, says: 'By "cornering the market" I mean when parties have contracts on hand for a greater amount than the sellers have cash grain to deliver. There was a greater amount of contracts than cash grain to deliver. The supply of cash wheat at that time in the market was owned entirely by Oliver. . . . I arrived at the conclusion that the market was cornered, as above stated, because I knew that a great many owed wheat, at the time, to Oliver and his brokers, that could not deliver it. It was not for sale on the market, to deliver on the contracts to Oliver. This was occasioned from the fact that Oliver and his brokers had the wheat due them, and also

owned the cash wheat at the time and those who owed the wheat could not buy it to deliver it. Wheat could not be had at current prices at that time. I know that Oliver had all the cash wheat from the fact that I had some for him myself, and from the fact that others held it for him, and I know it from the fact that he told me so.'

"Public policy will not permit appellants to recover for the money advanced by them in the illegal business of appellees, nor will the law give an action to appellees to recover from appellants moneys paid to them by other parties in the prosecution of such illegal enterprise. *Ex turpi causa, non oritur actio*. The enhancement of the price of an article of prime necessity, such as wheat or other articles necessary for food, for purposes of extortion, is against public policy. (Fuller v. Dane, 18 Pick. 472; De Witt v. Brisbane, 16 N. Y. 508.) 'Combinations whose object is to create what are known as "corners" in the market, or to control the traffic in any staple which is a popular necessity, or to enhance the price thereof, or to withhold the same from the market, are illegal.' (Greenhood on Public Policy, 642; Wright v. Crabb, 78 Ind. 487; Craft v. McConoughy, 79 Ill. 846.) Such a transaction, if had in this state, would be void, as being in contravention of the Criminal Code, sec. 180, ch. 38. Schneider et al. v. Turner, *ante*, p. 28.

"An agreement to make a corner in stock, by buying it up so as to control the market, and then purchasing for future delivery, is illegal, and a party thereto whose funds have been

services performed by him as a broker, even though his principal was engaged in an illegal combination with others to corner the market.¹

§ 92. Court of equity will investigate real nature of contract.—Where a court of equity is called upon to enforce any contract, it may admit evidence of the parties to show that the contract was in support of an unlawful combination, even though the illegality of the combination is not set up by the pleadings.²

used, by his consent, in carrying out the agreement, cannot recover the same back. (*Sampson v. Shaw*, 101 Mass. 145.) So it has been held that one who loans or advances money to be used for the purpose of making a corner in wheat cannot recover. (*Raymond v. Leavitt*, 46 Mich. 447.) So also money paid in furtherance of an illegal transaction or purpose cannot be recovered by the party advancing the same. *Ball v. Gilbert*, 13 Met. 397; *Dixon v. Olmstead*, 9 Vt. 310; *Wheeler v. Russell*, 17 Mass. 258; *People v. Fish*, 14 Wend. 9."

¹ *Wright v. Crabbs* (1881), 78 Ind. 487.

² *Wright v. Cudahy* (1897), 168 Ill. 86, 48 N. E. R. 32. The testimony of Cudahy, when called as a witness by the complainants, was, that when Wright proposed that they go into the deal together he said he could buy probably 150,000 or 160,000 barrels of pork and get the market short, and make his own price for the balance over the pork actually in existence; that there was not above 75,000 barrels in the Chicago market. This was not denied by Wright except as to the quantity in the Chicago market, but he claimed that by the deal they intended merely to take advantage of the favorable condition of the market; that there was a short corn crop the year before and he counted on a short supply of hogs. The evidence tends to show that

Wright and other members of the board of trade had reasonably accurate information as to the quantity of mess pork on the market in Chicago and other cities, and Wright himself testified that three-fourths of such pork was packed in Chicago. He knew that mess pork, to be what is called "regular," must be packed in a certain way and between October 1st and the first of the following April, and that the market could not be stocked with new pork after their operations were commenced, soon after the middle of April, and before the deal would be closed. On this branch of the case it is a strong circumstance tending to show that, whether Cudahy continued to be a partner with Wright or not, the scheme was to corner the market; that from 18,000 to 20,000 barrels of the pork purchased, and which was delivered through the Cudahy packing-house, was taken out of the barrels by the direction of Cudahy and Wright—at least with the knowledge and consent of both—and made "irregular" by sawing the pieces through the ribs and repacking them, thus so changing its condition that it could not be delivered on contracts made on the board for "regular" mess pork, and reducing the amount of such pork on the market by the amount so changed. Wright testified that this was done so that the pork could not be shipped

in again, resold and delivered to them; that he did not want to be buying and selling the same pork over and over again. In his testimony he defined a "corner" to be "where somebody succeeds in buying for future delivery more property of a given kind than is possible for the seller to deliver before the day of the maturity of the contract."

It is evident that that is precisely what he was attempting to do. By the attempt the market price of pork was advanced, and although the deal eventually proved unsuccessful, the attempt to corner the market, and the contract under which this attempt was made, were in direct conflict with the statute.

CHAPTER IV.

GAMBLING CONTRACTS, "OPTIONS" AND "FUTURES."

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163-165. Evidence.

166. Question of intent is for the jury.

§ 93. Gambling contracts under the common law.—Wagers were permitted under the common law provided they violated neither public decency nor morality, and were not contrary to any well-recognized principle of public policy. Recovery might be had upon wagers provided the wager was not contrary to public policy nor of an immoral nature, and provided further that it did not detrimentally affect the interest, feelings or character of a third person.¹

§ 94. The law of England as modified by statutes.—By the "Bubble Act" (6 Geo. I., ch. 18) it was enacted: "That from and after the four and twentieth day of June, one thousand seven hundred and twenty, all and every the undertakings and attempts described, as aforesaid, and all other public undertakings and attempts, tending to the common grievance, prejudice and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever, for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock or stocks, the transferring or pretending to transfer or assign any share or shares in such stock or stocks, without legal authority, either by act of parliament, or by any charter from the crown, to warrant such acting as a body corporate, or to raise such transferable stock or stocks, or to transfer shares therein, and all acting or pretending to act under any charter, formerly granted from the crown, for particular or special purposes therein expressed, by persons who do or shall use or endeavor to use the same charters for raising a capital stock, or for making transfers or assignments, or pretended transfers or assignments of such stock, not intended

¹ 2 Chitty on Contracts, 1006; Benjamin on Sales (4th Am. ed.), pp. 615, 618; *Monroe v. Smelley*, 25 Tex. 587.

or designed by such charter to be raised or transferred, and all acting or pretending to act under any obsolete charter become void or voidable by non-user or abuser, or for want of making lawful elections, which were necessary to continue the corporation thereby intended, shall (as to all or any such acts, matters and things, as shall be acted, done, attempted, endeavored or proceeded upon, after the said four and twentieth day of June, one thousand seven hundred and twenty) forever be deemed to be illegal and void, and shall not be practiced or in any wise put in execution."

A subsequent section provided that all such unlawful undertakings should be deemed common nuisances; and the twentieth section pointed out the mode in which merchants and traders might have their remedies against the undertakers.¹

§ 95. Later it was enacted² "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, should be null and void; and that no suit should be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person to abide the event on which any wager should have been made."

¹ By the 6 George IV., chapter 91, however, which recites "that it is expedient that the several undertakings, attempts, practices, acts, matters and things aforesaid (in the said act of 6 Geo. I. mentioned) should be adjudged and dealt with in like manner as the same might have been judged and dealt with according to the common law, notwithstanding the said act," the eighteenth, nineteenth and twentieth sections of the 6 George I., chapter 18, were repealed; and the result of this was to leave in full operation *the common law* relative to such schemes as, whether mentioned in the 6 George I. or not, could be considered injurious to the public welfare.

Formerly, indeed, it was thought that the 6 George I., chapter 18, was merely declaratory of the common

law on this subject. But it now appears to be quite decided that the raising of transferring shares in the stock of a company is not of itself an offense at common law; and it would even appear to have been doubted whether the mere presuming to act as a corporation is of itself an illegal act. But if there were any evidence that the creation of such assignable shares had been productive of injury or inconvenience to the queen's subjects, that would render their creation illegal. And so if it appeared that the scheme in respect of which such shares were created was one manifestly impracticable, such scheme would be held to be a mere bubble and illegal. 2 Chitty on Contracts, p. 1012 (1874).

² 8 and 9 Vict., ch. 109, § 18.

§ 96. Under this act it has been held that a contract for the future delivery of railway shares is good if the party in good faith, at the time of making the contract, intended to actually deal in the shares in question.¹

§ 97. It has also been held that a broker who has become personally liable under the rules of the stock exchange for transactions entered into at the request of his client can recover his commissions, although he knew that his client at the time the orders were given had no intention to actually deal in the stocks, but intended to settle upon differences.²

§ 98. **Wagering contracts unlawful in America.**—Notwithstanding their validity within certain limitations at common law, all wagering contracts are held to be illegal and void as against public policy under the American decisions.³

¹ Grizewood v. Blane, 11 C. B. 538.

² Thacker v. Hardy, 4 Q. B. D. 685, also 48 L. J. Q. B. 289.

The effect of the statute of 8 and 9 Victoria, *supra*, is stated by Mr. Benjamin as follows: "At common law, wagers that did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited. Since the passage of the above statute, however, cases have arisen which present the question whether an executory contract for the sale of goods is not a device for indulging in the spirit of gaming which the statute was intended to repress. It has already been shown that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them. But such a contract is only valid where the parties really intend and agree that the goods are to be delivered by the seller, and the price to be paid by the buyer. If, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the

contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute." Benjamin on Sales (4th Am. ed.), 615.

³ Irwin v. Williar (1883), 110 U. S. 508; Dickson's Ex'r v. Thomas, 97 Pa. St. 278; Gregory v. Wendell, 40 Mich. 432; Lyon v. Culbertson, 83 Ill. 33; Melchert v. American Union Tel. Co., 3 McCrary, 521, 11 Fed. R. 193, and note; Barnard v. Backhaus, 52 Wis. 598; Kingsbury v. Kirwan, 77 N. Y. 612; Story v. Salomon, 71 N. Y. 420; Love v. Harvey, 114 Mass. 80.

In Irwin v. Williar the supreme court of the United States said: "The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any means of getting them other than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if, under guise of such a contract, the real intent be merely to

§ 99. Various forms of commercial transactions.—It will be convenient to state and bear in mind the various forms of legitimate commercial transactions:

1. *For immediate delivery.*—The simplest of commercial transactions is where a party sells to another an article which the seller has in his possession, and makes immediate delivery, receiving therefor the price agreed upon.

2. *For future delivery.*—Transactions for future delivery fall under the following heads:

(a) Where the seller has in his possession the article sold ready for immediate delivery, but the buyer for some reason wishes the delivery postponed.

(b) Where the seller has the article in his possession but not ready for immediate delivery—such as goods in process of manufacture, growing crops, etc.

speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void." *Flagg v. Baldwin*, 38 N. J. Eq. 219; *Pickering v. Cease*, 79 Ill. 328; *Kirkpatrick v. Bonsal*, 72 Pa. St. 153; *Cobb v. Prell*, 16 Cent. Law Jour. 453; *Hooker v. Knab*, 26 Wis. 511.

In *Monroe v. Smelley*, 25 Tex. 587, it is said: "It is true that by the common law an action could be maintained on a wager, although the parties had no previous interest in the question on which it was laid. But this proposition was always subject to qualifications. These qualifications were that an action could not be maintained on a wager if it was contrary to public policy or immoral, or in any other respect tended to the detriment of the public, or if it affects the interests, feelings or character of a third person."

After reviewing cases at some length which illustrate the tendency

of later decisions, the opinion proceeds to declare the result and rule which we believe to be sustained by authority, and in harmony with the present time, in the following language: "The uniform tendency of the later decisions is to treat all gaming contracts and all wagers as utterly void. We feel ourselves authorized to conform our decisions to the public policy and to the sense of morality which the modern decisions and the modern legislation on the subject of gaming and wagers so clearly indicates. We find that the ancient rule of the common law was subject to certain exceptions, and, in proportion as the courts have considered these questions, these exceptions to the ancient rule have been adjudged to be more and more comprehensive in their embrace, until, as has been said, the exceptions to the rule have taken the place of the rule itself. We think that in the true spirit and meaning of the exceptions to the old rule, all idle wagers and all gaming contracts may be properly held to be void." To the same effect is *Conner v. Mackey*, 20 Tex. 747.

(c) Where the seller has not in his possession the article sold, but has already contracted for the article, and simply postpones delivery until the contract he relies upon is fulfilled.

(d) Where the seller has not the article in his possession, and has made no contract for the same, but expects to go out and either buy or contract for the article and secure the same in time to make his delivery.

These several forms of commercial transactions are normal, proper and legitimate, and are in every-day use in the commercial world.

§ 100. It was once held¹ that if a party enters into a contract for the sale of goods to be delivered at a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver, such a contract on the part of the vendor amounted to a wager on the price of the goods in the market. This decision covers case (d) under "Future Deliveries." In a later case, however,² this dictum of Lord Tenterden's was unanimously overruled, one of the judges declaring that the doctrine was clearly contrary to law; another judge stating that there existed no principle in its favor; and later English cases are to the same effect.³

§ 101. And it is well settled that contracts for future delivery may be made, leaving the day of delivery to be selected by one party or the other, as the agreement may provide, sometimes at the seller's option, sometimes at the buyer's option.⁴

§ 102. And the contract may be obligatory upon one party and not upon the other.⁵

¹ See Lord Tenterden in *Bryan v. Lewis*, Ry. & M. 386.

² *Hibblewhite v. McMorine*, 5 Mees. & W. 463.

³ *Mortimer v. McCallan*, 6 Mees. & W. 58; *Stanton v. Small*, 3 Sandf. 230; *McIlvaine v. Egerton*, 2 Robt. 422; *Walcott v. Heath*, 78 Ill. 433; *Kingsbury v. Kirwan* (Sup. Ct. N. Y.), 6 Cent. L. J. 228.

⁴ *Williams v. Tiedemann* (1878), 6 Mo. App. 269.

⁵ Nearly analogous to the last men-

tioned form is that wherein an executory contract is obligatory upon one party but not upon the other. A. may, for a sufficient consideration, bind himself to buy at a fixed price all the wheat that B. may bring to his warehouse on a certain day; B., however, may be under no obligation to bring any wheat at all. In *Giles v. Bradley*, 2 Johns. Cas. 253, the court said: "There can be no doubt that a contract may be so made as to be optional on one of the parties and ob-

§ 103. Speculation.—In the broadest sense of the term, speculation is the hazarding of one's fortune upon contingencies more or less uncertain. There can be no speculation where the event is certain; and the extent to which a given transaction is speculative is exactly in proportion to the uncertainty of the contingencies upon which the transaction is based.

Aside from the simple transaction of the purchase of a product or an article for consumption by the buyer and not for resale, there are few commercial transactions into which the element of speculation does not enter to a greater or less extent.

§ 104. — in transactions for immediate delivery.—Referring to the enumeration of the various forms of commercial transactions, it is obvious that the element of speculation not only may, but does, enter into transactions for immediate delivery. In such transactions the element of speculation is entirely upon the side of the buyer. So far as the seller is concerned the transaction itself terminates all contingencies for him; whereas, if the buyer is purchasing to sell again at an advanced price, as is the case with all merchants and middlemen, the buyer is speculating upon a future rise or fall in the price of the product.

In most instances the element of speculation is slight, since the course of the market is fairly certain.

§ 105. — in transactions for future delivery.—It is in transactions for future delivery that the element of speculation enters in large degree.

(a) Where the seller has in his possession the article sold for immediate delivery, but the buyer for some reason wishes the delivery postponed, there is no speculation on the part of the seller, and the buyer is speculating upon the future only in so far as he intends to make some further disposition of the product or article for profit.

(b) Where the seller has the article in his possession but not

ligatory on the other, or obligatory at the election of one of them." The rule was illustrated in *Mason v. Payne*, 47 Mo. 517; also in *Kirkpatrick v. Bonsal*, 72 Pa. St. 155, and in *Tyler v. Burrows*, 6 Robt. 104. Thus, a contract for a sale and delivery which is obligatory on one party and optional as to the other will not on that account be denied enforcement in a court of justice, unless, as in Illinois, it be expressly forbidden by statute. *Williams v. Tiedemann, supra.*

ready for immediate delivery — such as goods in process of manufacture, growing crops, etc., the element of speculation on the part of the seller is slight; but even in such cases the seller may be taking some chances upon the future contingencies.

(c) Where the seller has not in his possession the article sold, but has already contracted for the article, and simply postpones delivery until the contract he relies upon is fulfilled, there is no element of speculation on the part of the seller, but the buyer, in so far as he intends to turn the product over at a profit, is taking chances on the future.

(d) Where the seller has not the article in his possession and has made no contract for the same, but expects to go out and either buy or contract for the article and secure the same in time to make his delivery, the seller is speculating upon the conditions and contingencies which will affect his ability to fulfill his contract, and the buyer is indulging in speculation to the extent that he expects to resell at profit, and may also be speculating upon the ability of the seller to fulfill his contract.

Speculation is most common in transactions falling under paragraph (d), and it is these transactions which merge into gambling and wagering contracts.

So far, all the transactions enumerated and the speculation described are normal and legitimate.

§ 106. The right to buy any product in open market in the hope of profit by rise in the market value is well established.

§ 107. The right to purchase products on speculation for future delivery is also established.¹

¹ Cassard v. Hinman, 1 Bosw. (N. Y.) 207; Ashton v. Dakin, 7 W. R. 384, 867; Brua's Appeal, 55 Pa. St. 294. In Gregory v. Wendell (1879), 40 Mich. 432, the supreme court said:

"On the face of the transaction the contract was perfectly good and lawful; it could not have been a gambling contract unless both parties participated in the illegality by uniting in the intent; and where apparently the contract is good, the right of either party to an enforcement cannot be taken away except by show-

ing concurrence in the unlawful purpose. If either party meant it as a lawful and legitimate transaction, it must be held to be lawful and legitimate. If the purposes of defendants were to engage in genuine dealings in this instance, the right of Wendell & Co. to enforce the contract would be complete, even though they had never engaged in a like transaction before; for gamblers may make lawful contracts as well as others.

"If a miller from the interior of Michigan were to go to Chicago and

§ 108. But to support a contract for the sale and delivery of grain at a future day it must satisfactorily appear that the contract was made with an actual view to the delivery and receipt of the grain, and not as a mere cover for gambling transactions.¹

§ 109. The transaction is valid if the buyer intends that there shall be an actual delivery in the future and the seller expects to deliver unless the price goes beyond the contract price.²

§ 110. Speculation in stocks.— Purchases and sales of stocks on the stock exchange are entirely legitimate where there are actual purchases and deliveries and not mere dealing in differences.³

there request a produce broker, who for a series of years has been engaged in gambling transactions in grain, to purchase for him ten thousand bushels of wheat for future delivery, contemplating at the time an actual receipt of the grain for business purposes, would it be claimed that the broker, in defense to an action for non-delivery, might prove that he had never previously made delivery of grain so purchased, and thereupon argue that it must be inferred the parties contemplated no delivery in this instance? And if he might not give such proof in an action against him for non-performance, on what ground could the miller be suffered to give it by way of defense to an action for refusing to receive the wheat when tendered? It seems to us that these questions require no discussion. The illegal intent that shall defeat the contract must be the common intent of both parties; and if either has a lawful and legitimate purpose in making the contract, or if he supposes the other to have, and contracts with him on that supposition, his right to recover upon the contract after performing or tendering performance must be clear.

"If a contract on its face contemplates illegal dealings, no question of intent can be open as a question of

fact. But this contract was not one of that sort. It was perfectly legitimate on its face, and apparently contemplated nothing which was opposed to any principle or policy of the law. Now, if such a contract is susceptible of being carried out in a lawful way, without conflicting in any manner with any common intent which is shown to have been indulged or held by the parties at the time the contract was entered into, we discover no ground on which it can be held to be valid. It is not enough to defeat it that it is susceptible of an illegal use, or that one of the parties to it may have contemplated and designed such illegal use, if the other had a right to suppose under the circumstances that the contract was to have effect according to its apparent and lawful construction. This is the view expressed in substance by the Kentucky court of appeals in *Sawyer v. Taggart*, *Chicago Legal News* for 1879, p. 138."

¹ *Deierling v. Sloop* (1896), 67 Mo. App. 446.

² *Deierling v. Sloop*, *supra*.

³ *Pratt v. Boody* (1896), 55 N. J. Eq. 175, 85 Atl. R. 1113. In *Kirkpatrick v. Bonsal* (1872), 72 Pa. St. 155, the court said: "We must not confound gambling, whether it be in corporation stocks or merchandise, with

§ 111. Executory contracts.—An executory contract for the sale of goods for future delivery is not a wagering contract by reason of the fact that at the time of the making of the contract the vendor had not the goods in his possession, and had

what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh, that is, speculate upon the probabilities of the coming market, and act upon this lookout into the future, in their business transactions; and in this they often exhibit high mental grasp, and great knowledge of business and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell in a *bona fide* way. Such speculation cannot be denounced. But when ventures are made upon the turn of prices alone, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of the price at a given time, the case is changed. The purpose then is not to deal in the article, but to stake upon the rise or fall of its price. No money or capital is invested in the purchase, but so much only is required as will cover the difference—a margin, as it is figuratively termed. Then the bargain represents not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions. Hence, ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfill, and thus the apparent business in the particular trade is inflated and unreal, and like a bubble needs only to be pricked to

disappear; often carrying down the *bona fide* dealer in its collapse. Worse even than this, it tempts men of large capital to make bargains of stupendous proportions, and then to manipulate the market to produce the desired price. This, in the language of gambling speculation, is making a corner—that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and then to place its price within their power."

In *Whitesides v. Hunt* (1884), 97 Ind. 191, the court said: "It was formerly held that when the vendor had neither the goods, nor entertained any contract to buy them, at the time of the sale, nor had any reasonable expectation of receiving them by consignment, but intended to go into the market and buy the articles he engaged to deliver, no action could be maintained on such contract. But the rule has been changed by the later authorities, and there have been numerous decisions, particularly in this country, holding that the vender may contract for the sale of an article not in his possession, and this doctrine seems to be entirely in accordance with the rules of public policy. *Bryan v. Lewis, Ry. & Moody*, 386, and note *a*."

"In the last case cited the court says: 'The mercantile business of the present day could no longer be successfully carried on if merchants and dealers were unable to purchase that which as to them had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go

not entered into any contract to provide for them, but expected to go into the market and buy them.¹

§ 112. Illegal contract made good by subsequent agreement.— And even though a transaction originated in an inten-

into the market and buy; and it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time.'

"There is a difference, and a distinction must be made, between a contract where there is a *bona fide* intent to fulfill the agreement according to its terms, and those where the difference in the market price is to be paid. There can be no doubt but that sales of a commodity to be delivered at some other time are valid, but if the parties agree at the time of making the contract that no title to any property shall pass or any delivery be made, or when, from the nature of the contract, it must be apparent that the intent of the parties was such that at some future specified time the losing party should pay to the other the difference between the selling price at that time and the time of making the contract, it would be a contract which the law would refuse to enforce, for the reason that it is clearly a wager upon the price of the commodity at some future day. *Yerkes v. Salomon*, 11 Hun, 471.

"In the case of *Rumsey v. Berry*, *supra*, the court very clearly defines the line which separates the two classes of contracts, the legal from the illegal. In that case it was said: 'A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the pur-

chaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure.'

"In the case of *Kent v. Miltenberger*, 16 Cent. L. J. 433, in the opinion by Thompson, J., it was held that where, by the terms of the contract, the commodity, at the maturity of the contract, may be required to be delivered, or damages recovered for the breach, unless a delivery is waived by the opposite party, the contract will be held to be legal, unless there is an express agreement made, at the time of the contract, that the property should not be delivered, and that such an agreement, subsequently made, would not vitiate the contract."

¹*Sawyer v. Taggart*, 14 Bush, 727; *Conner & Hare v. Robertson*, 37 La. Ann. 814 (1885); *Gregory v. Wendell*, 39 Mich. 337, 340 (1878); *Mortimer v. McCallan*, 6 M. & W. 58 (1840); *Barry v. Croskey*, 2 J. & H. 1 (1861); *Noyes v. Spaulding*, 27 Vt. 420 (1855); *Eastman v. Fisk*, 9 N. H. 182 (1838); *Thompson v. Alger*, 12 Met. (Mass.) 428 (1847); *Cole v. Milmine*, 88 Ill. 349 (1878); *Cameron v. Durkheim*, 55 N. Y. 425 (1874); *Union Nat. Bank v. Carr*, 15 Fed. R. 438 (1883); *Hatch v. Douglass*, 48 Conn. 116 (1880); *Roundtree v. Smith*, 108 U. S. 269 (1883); *Bigelow v. Benedict*, 70 N. Y. 202 (1877); *Baldwin v. Binsmore*, 6 L. C. Jour. 297 (1861); *Kingsbury v. Kirwin*, 11 J. & Sp. (N. Y.) 451 (1878); *Tyler v. Barrows*, 6 Rob. (N. Y.) 104 (1868); *Cas-*

tion to gamble upon differences, a subsequent agreement for the actual sale and purchase of the stock or product will make the transaction valid and the subsequent agreement will be enforced.¹

§ 113. **Intent of parties determines validity.**— Validity of the original contract depends upon the intention of the parties at the time of the making of the contract, and is not affected by any subsequent agreement whereby the parties voluntarily agree upon differences in prices without any transfer of the product dealt in. Parties to valid executory contracts have the same liberty to settle their transactions and differences by common consent as parties to other contracts. They may deliver and receive the goods, or they may come to a settlement upon the differences in price, providing the original undertaking was valid and binding.²

§ 114. A purchase of grain in good faith to be delivered in the following month, which gives the seller at his option until the last day of the month to make delivery, is not a gambling contract, and the purchaser is entitled to its fulfillment, regardless of the secret intention of the seller.³

sard v. Hinman, 1 Bosw. (N. Y.) 207 (1857); *Trask v. Vinson*, 20 Pick. (Mass.) 105 (1838); *Story v. Solomon*, 71 N. Y. 420 (1877); s. c., 6 Daly, 531; *McElvaine v. Egerton*, 2 Rob. (N. Y.) 422 (1864); *Ridgeley v. Riggs*, 4 H. & J. (Md.) 358 (1818); *Marshall v. Thurston*, 3 Lea (Tenn.), 740 (1879); *Gilchreest v. Pollock*, 2 Yeates (Pa.), 18 (1795); *Wolcott v. Heath*, 78 Ill. 433, 437 (1875); *Sanborn v. Benedict*, id. 308 (1875); *Rumsey v. Berry*, 65 Me. 570 (1876); *Barnett v. Baxter*, 64 Ill. App. 544 (1896); *Hopkins v. O'Kane*, 169 Pa. St. 478, 32 Atl. R. 421; *Wagner v. Hildebrand*, 187 Pa. St. 136, 41 Atl. R. 34.

¹ *Anthony v. Unangst*, 174 Pa. St. 10, 34 Atl. R. 284; *In re Taylor's Estate*, 192 Pa. St. 304 (1899), 43 Atl. R. 973.

² *Clarke v. Foss*, 7 Biss. 540. It follows, necessarily, that the failure to identify the particular goods sold does not affect the matter, because, from the very nature of the contract,

the sale is not of ascertained articles, but of articles of a designated kind and quantity to be selected hereafter, and is discharged by the delivery of articles answering to the general description given in the contract. *Sawyer v. Taggart*, 14 Bush, 729; *Conner & Hare v. Robertson*, 37 La. Ann. 814, 819 (1885).

³ *Pixley et al. v. Boynton et al.* (1875), 79 Ill. 351.

In another case decided about the same time the supreme court of Illinois said: "Agreements for the future delivery of grain, or any other commodity, are not prohibited by the common law, nor by any statute of this state, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in the market values. The alleged contracts for August and September come within this definition. No grain was ever bought

§ 115. **Terms in use on stock exchanges.**—Before passing to the consideration of gambling contracts it will be advantageous to define the peculiar terms in common use upon stock exchanges and boards of trade.

The transactions on stock exchanges are commonly known as —

§ 116. **A. “Cash.”**—A “cash” transaction means that delivery of the stock or bonds is to be made on the day the transaction is made.

and paid for, nor do we think it was ever expected any would be called for, or that any would have been delivered had demand been made. What were these but ‘optional contracts’ in the most objectionable sense; that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling, for the grain, just as they chose. On the maturity of the contracts they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts.” *Pickering et al. v. Cease* (1875), 79 Ill. 328, 330.

But the same court has also held that “a contract for the sale of wheat in store, to be delivered at a future time, which requires the parties to put up margins as security, and provides that, if either party fails, on notice, to put up further margins according to the market price, the other may treat the contract as filled immediately, and recover the difference between the contract and market price, without offering to perform on his part, or showing an ability to perform, is illegal and void, as having a pernicious tendency.” *Lyon et al. v. Culbertson* (1876), 83 Ill. 33.

In *Melchert v. Am. Union Tel. Co.* (1892), 11 Fed. R. 193, the court said: “The contracts in question were for the delivery of rye in the month of September at the seller’s option. A contract for delivery at the seller’s

option may be valid or invalid. It depends upon the nature of the option as shown in the intention and purpose of the parties. The option may refer to the fact of delivery or merely to the time of delivery. If it be the intention of the parties that the property shall be in fact delivered, giving the seller’s option as to the time of delivery within a certain period, I see no valid objection to such a contract. It is but a contract for sale of property to be delivered in the future, within a given time. But if it be not the *bona fide* intention of the parties that the property shall be in fact delivered in fulfillment of the contract of sale, but that the seller may, at his election, deliver or not deliver, and pay “differences,” then the contract is void. Such a dealing amounts to a mere speculation upon the rise and fall of prices. It required no capital, except the small sums demanded to put up margins and pay differences. It promotes no legitimate trade. Any impecunious gambler can engage in it, with infinite detriment to the *bona fide* dealer. It enables mere adventurers, at small risk, to agitate the markets, stimulate and depress prices, and bring down financial ruin upon the heads of the unwary. It enables the unscrupulous speculator, with little or no capital, to oppress and ruin the honest and legitimate trader. Corners and Black Fridays and sudden fluctuations in values are its illegitimate progeny.”

§ 117. B. "**Regular.**"—A "regular" transaction means that delivery of the stock or bonds is to be made on the day following the date of the transaction. Nearly all of the transactions on the floors of the various stock exchanges are what are known as "regular." The purchase or sale is made on one day, and the customers are notified by the brokers either on the same day or the morning of the following day, and the customer making the sale is supposed to have the stock or bonds ready for delivery on the day following the sale, and the party purchasing the same is supposed to be ready to take up and pay for the stock or bonds when so delivered. On stock exchanges the actual deliveries of stock or bonds are usually made, the broker selling delivering the actual certificates of stock or bonds to the broker buying. It does not follow, however, that in the majority of the transactions the customers for whom the trades are made either have or receive the stocks or bonds; the deliveries may be wholly among the brokers, the customer protecting the broker by the deposit of a "margin."

§ 118. C. "**Seller 3.**"—"Seller 3" means that the seller has the right to deliver at any time within three days by giving one day's notice to the purchaser. On "sellers 3" no interest runs, but upon all time transactions over three days up to sixty days interest runs to the day of delivery.

§ 119. D. "**Account trading.**"—"Account trading" means that the stock is sold and bought with the privilege of having it carried until settlement day, which is the last day of each month; if it is desired to have the stock carried longer it must be turned into account of the following month.

§ 120. E. "**Selling short.**"—"Selling short" is the sale of stock or bonds by parties who have neither the stock nor the bonds to deliver. Inasmuch as deliveries must be made on the following day, it is necessary for either the customer or the broker making the sale to borrow the stock for delivery. This is a common transaction among professional traders, experienced dealers in the stock market preferring often to "sell short" rather than "buy long." It is commonly said that the public is far more apt to buy stock or bonds or grain than to "sell short;" the average man understands without explanation the simple mechanism of buying stocks, bonds or grain

which he thinks will advance in price, and either paying for them or having them carried for him upon a "margin;" whereas the average man does not understand without a good deal of explanation the mechanism of selling stock or bonds or grain that he does not own and sees no prospect of securing; he does not like the idea of selling stock he does not own and borrowing stock from somebody else to carry out his contract. Knowing this tendency on the part of the trading public to "bull" the market by buying rather than "selling short," the professional trader finds his profit in selling against this tendency.

§ 121. F. "Margins."—A "margin" is the amount deposited by a customer with his broker to protect the broker against any transaction which he may make pursuant to the customer's orders. On the floor of the stock exchange and on the floor of the board of trade the customer is not known. Each transaction is between the brokers making the same, and the brokers look to one another for the fulfillment of the contracts made.¹

§ 122. Terms in use on board of trade.—The technical terms in use upon the board of trade are somewhat different from those in use upon stock exchanges, and are as follows:

§ 123. A. "Puts" and "calls."—A "put" is the privilege of "putting" — that is, tendering and compelling him to accept — to another party the amount of wheat or product agreed upon at the price agreed upon, and the privilege is usually to be exercised within the trading hours of the day following; but sometimes the privilege of making "puts" extends over a longer period, as may be agreed upon. To describe the transaction a little more clearly: A. agrees that at any time within the trading hours the day following, B. may "put" to him five thousand bushels of wheat at say eighty cents per bushel, and if the wheat is so "put" — that is, tendered — A. agrees to take the same at the price agreed upon, viz., eighty cents. For this privilege of "putting" the wheat B. pays a certain

¹ The "margin" required on the stock exchange is usually about "ten points," meaning \$10 a share. "Margin" upon the board of trade varies according to article dealt in: on wheat, 2 cents a bushel; corn and oats, 1 cent a bushel; ribs, 30 cents a hundred pounds (value from \$6 to \$7 a hundred pounds); lard, \$1 a tierce (value of tierce about \$21); pork, 50 cents a barrel (\$11.50 value of barrel).

sum. B. is not bound to "put" the wheat, but has the privilege of doing so. In other words, for a certain sum A. takes his chances upon the price of wheat falling during the trading hours the day following. If the price goes down, B. purchases the five thousand bushels at the lower price, and immediately turns it over to A. at the agreed price of eighty cents, thereby making the difference. If the price goes up, B. simply loses the amount he paid for the privilege of making the "put."

§ 124. A "call" is exactly the reverse of a "put;" it is the privilege of "calling" during the trading hours the day following from a party a certain amount of any given product at a fixed price. The party who purchases, and has the privilege of making a "call," makes a profit if the price of wheat goes up on the day following, for he has a right to claim the amount agreed upon at the lower price fixed in the privilege, while the party selling the privilege takes his chances upon the wheat market descending.¹

§ 125. B. "Futures."—"Futures" cover, ordinarily, wheat, grain, seed and provisions, and apply technically to the coming crops of hay, grain and seed, and the coming supplies of provisions. By provisions is usually meant pork, lard and ribs. All transactions in these various products for future deliveries fall under the head of "futures."

§ 126. C. "Cash."—A "cash" transaction on the board of trade means that the product purchased is deliverable at any time at the option of the seller within the month. Immediate delivery cannot be had by the buyer except by special arrangements with the seller.²

§ 127. D. "Ringing up trade."—The "ringing up" of trades is in effect a sort of clearing-house transaction for the different members; that is, a member having transactions on both sides, that is, sales and purchases, will offset these sales

¹ "Puts" and "calls" are contrary to the rules of the Chicago Board of Trade. They were formerly largely dealt in after the regular trading hours of the day were over. They constituted a convenient method of "guessing" upon the market the day following, and gambling upon the "guesses."

² The common deliveries on grain and provisions during the year are in the months of May, July, September and December. There are sales made in pork sometimes for August delivery. These months have well defined relations to coming crops of hay, grain, seed and provisions.

and purchases by finding a member having corresponding sales and purchases and transferring his trade, in that way eliminating all trades that offset each other. This offsetting of trades releases, of course, whatever capital is tied up by the trades eliminated.¹

§ 128. “**Bucket shop.**” — A “bucket shop” is an office or place purporting to have wire connections with boards of trade and stock exchanges, and to furnish to customers — usually by means of a blackboard — the current prices of grain, stocks, etc. Trades are made on the basis of the quotations as they come in, customers ordering the proprietor to “buy” or “sell” grain or stocks according as they think the market will go up or down; orders are not executed, nor is it expected by customers who understand the nature of the business that they will be executed, as it is simply a wager between the proprietor and the customer as to what the coming quotations will be; for the privilege of making this wager the customer pays a commission, and is lucky if the quotations purporting to come over the wire are not manipulated to his disadvantage.

§ 129. When a regular broker is accused of “bucket shopping” his trades, it means that he is charged with not executing orders given him, but with simply noting them on his books and taking his chances of the market going his way.²

¹ On the board of trade the smallest transaction recognized on the floor is five thousand bushels in all grains and flax seed, fifty thousand pounds of ribs, two hundred and fifty tierces of lard, two hundred and fifty barrels of pork.

² In *Pearce v. Dill* (1897), 149 Ind. 136, 48 N. E. R. 788, the supreme court of Indiana said: “The evidence fully proves that the appellant Pearce was operating what was commonly denominated a ‘bucket shop;’ in fact, this is established by his own admissions on his cross-examination. He was engaged in conducting the illegal business of selling ‘futures’ or ‘options.’ The products which he pretended to sell to his customers he did not have at the time, and it was mutually under-

stood and intended by both parties that the wheat or corn which was claimed to be sold and purchased was not to be delivered, but when the time fixed for its delivery arrived the market value at Chicago of such cereals should constitute the basis upon which the settlements would be made. As the market price would rise or fall, there would be a loss or gain to the purchaser. The deals or transactions were understood to be a speculation solely on chances, and were in contravention of, and hostile to, public policy, and therefore illegal. Such transactions are of like character, and akin to bets made on a game of poker or faro, and are equally as uncertain and hazardous. The business or operations of the ‘bucket shop’

§ 130. Transactions on stock exchange and board of trade legal on their face.—Most transactions on the stock exchanges and boards of trade¹ are legal upon their face. Trading in "privileges," that is "puts" and "calls," is clearly gambling,

have been the source of much evil. Embezzlements and other crimes on the part of public officers and bank officials, having the custody of money belonging to others, have been in the past some of the evil fruits directly traceable to dealing in futures in these institutions; and the question of prohibiting such transactions or business, as it is generally conducted, merits the consideration of the legislature. Such dealings as those in which Pearce and the husband of the appellee engaged have repeatedly been condemned as illegal by the decisions of this court." Citing *Whitesides v. Hunt*, 97 Ind. 191; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. R. 687; *Davis v. Davis*, 119 Ind. 511, 21 N. E. R. 1112; *Plank v. Jackson*, 128 Ind. 424, 26 N. E. R. 568, and 27 N. E. R. 1117.

In *Bryant v. Western Union Tel. Co.*, 17 Fed. R. 825, 17 Cent. L. J. 361, the court says: "The complainants never buy or sell for present delivery, but always deal in futures and upon margins. Whenever the required margin is placed in the hands of complainants, they will buy or sell, as customers desire, grain, etc., at the last quotation of the Chicago Board of Trade. This is always for the next or succeeding month's delivery, and the deal is taken by the complainants themselves. The customer must always keep his margin good, and that without notice; and if any time before the time fixed for the delivery the market in Chicago goes against the customer to the extent of his margin, the trade is closed and the complainants take the margin and the customer is not personally liable,

the extent of his loss being his margin. If, however, the market should go in favor of the customer, he may call for a settlement at any time and without regard to the maturity of his contract, and he is then paid the difference between the then market price and the price at which he bought or sold, less a sum which is called by complainants 'a commission.' This sum, which is one-fourth of a cent on each bushel of grain which is alleged to be bought or sold, is not a commission, as the complainants always take the deal themselves, and do not pretend to buy or sell to others for the account of the customer, but is really the odds which the customer gives them in the wager on the future of the market. It is perhaps true, if the customer keeps his margin good so that he cannot be closed out, and does not exercise his right to settle upon the basis of the difference in the prices of the grain, etc., he can demand a compliance with the contract and a delivery; but if the course of business between the complainants and their customers is to settle their alleged contract by a payment of the differences in the market rates, the fact that a customer may, under certain circumstances, require an actual delivery, does not relieve the complainants from the charge of carrying on a 'bucket shop.' It is the general course of a man's business which defined and classified it. If 'bucket shop' means a place where wagers are made upon the fluctuations of grain and other commodities, then I think the evidence shows the complainants keep such a 'shop,' and are

¹ As enumerated in §§ 115 to 127.

since the intention of the parties to the trade to gamble upon the rise or fall of prices on the following day is plain from the nature of the transaction. With the exception of trading in "privileges," all the other transactions enumerated may be and in many cases are entirely regular and legal. The memoranda of the transactions made by the brokers and all notices and statements sent to customers read as if actual deliveries were contemplated, and if actual delivery is contemplated there is no reason why a party may not indulge in any one of the transactions enumerated, even to the "selling short" of stocks or bonds, which the seller must borrow for immediate delivery with the expectation of subsequently buying in at a lower price and returning those which he has borrowed.¹

§ 131. Test of the legality of transaction.—It has been asserted that the test of the validity of a contract for future delivery is whether it could be settled only in money, and in no other way, or whether the party selling could tender and compel the acceptance of the particular commodity sold, or the party buying could compel the delivery of the commodity purchased.²

of the class to which defendants are prohibited from furnishing the market quotations of the Chicago Board of Trade. This is gambling, and a very pernicious and demoralizing species of gambling, which a court of equity should not protect, even if the board of trade had not taken the action it has. It is true that this kind of gambling has not yet been made criminal by the statute law of the state; still if a case of wager is made out, none of the state courts will enforce such contracts. *Sawyer v. Taggart*, 14 Bush, 727. Gambling on the fluctuation in the market prices of stocks, grains, etc., is against the public policy of the state, though it may not be a crime punishable by fine or imprisonment."

¹ Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise,

or sell "short," to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, Did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a year, and then sold, no one would call it gambling; and yet it is just as little so, if he had it but an hour, and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock, but which he undertakes to get for you, is selling "short;" but he is not gambling, because, though delivery is to be in the future, the sale is present and actual. In *re Taylor's Estate* (1899), 192 Pa. St. 304, 43 Atl. R. 973.

² *Sampson et al. v. Camperdown*

§ 132. It is plain, however, from the authorities cited that this test is not of universal application. Many a legitimate transaction can be settled only in money. Many a party contracts in good faith to do that which he is entirely unable to

Mills (1897), 82 Fed. R. 833. In this case the court said:

"The contracts in the case at bar were made according to the rules of the New York Exchange, and afterwards according to the rules of the Liverpool Cotton Exchange. The general law does not forbid contracts for the future delivery of any kind of personal property. Nor is the contract made illegal if one or the other settles the contract by the payment or receipt of money. The true test of the validity of the contract is whether it could be settled only in money, and in no other way; or whether the party selling could tender and compel the acceptance of the particular commodity sold; or whether the party buying could compel the delivery of the commodity purchased. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950. Under the rules of the New York Cotton Exchange all sales or purchases for the future delivery of cotton contain an express provision that there must be an actual delivery of cotton if this be required. For this reason the validity of these contracts has been sustained by the courts of New York. This being the general law, is there anything in the law of South Carolina which conflicts with it? It may be assumed, for the purpose of this discussion, that such a law in South Carolina would enter into and be a part of the charter of the Camperdown Mills, a South Carolina corporation. The legislation of this state is found in Acts of Assembly, 1883 (18 Stat. at Large, p. 454), 'An act to declare unlawful contracts for the sale of articles for future delivery made under certain circumstances, and to provide a remedy in such

cases.' This act makes unlawful 'every contract, bargain or agreement, whether verbal or in writing, for the sale or transfer at any future time . . . of any cotton, grain, meats, or any other animal, mineral or vegetable product of any and every kind, unless the party contracting, bargaining or agreeing to sell or transfer the same is, at the time of making such contract, bargain or agreement, the owner or the assignee thereof, or his duly authorized agent to make or enter into such contract, bargain or agreement for the sale or transfer of such . . . cotton, grain, meats, or other animal, mineral or vegetable product so contracted for, or unless it is the *bona fide* intention of both parties to the said contract, bargain or agreement at the time of making the same that the said . . . cotton, grain, meats, or other animal, mineral or vegetable product so agreed to be sold and transferred shall be actually delivered in kind by the party contracting to sell and deliver the same, and shall be actually received in kind by the party contracting to receive the same at the period in the future mentioned and specified in said contract, bargain or agreement for the transfer and delivery of the same.' The regulations of the New York Cotton Exchange are not in conflict with this act. All depends upon the *bona fide* intent of the parties; and, as the words of the contract expressly give the right to the seller to deliver, and to the buyer to demand the delivery of the article sold, this expresses that intent. The burden of showing that a contract like this—valid on its face—is invalid is on the complainants in the cross-bill."

perform, and the law compels him to make good in money whatever damages result from his lack of judgment and foresight.

§ 133. The validity of the transaction depends entirely upon the intent of the parties at the time the contract was made. If the parties intend to actually deliver and receive the product or article dealt in, the transaction is legal, even though at the time of making the contract the seller has not the article to deliver and the buyer has not the means wherewith to pay for the same.

§ 134. If, however, at the time of the making of the contract, actual delivery and receipt are not contemplated, but it is the intention of the parties to settle upon differences in price, then the contract is a gambling contract and illegal.¹

See also *Bibb v. Allen*, 149 U. S. 481, 3 Sup. Ct. R. 950.

¹ *Deierling v. Sloop* (1896), 67 Mo. App. 446; *Pratt v. Boody* (1896), 55 N. J. Eq. 175, 35 Atl. R. 1113; *Kirkpatrick v. Bonsal* (1872), 72 Pa. St. 155; *Irwin v. Williar*, 110 U. S. 507, 4 Sup. Ct. R. 160; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. R. 203; *Williams v. Tiedemann*, 6 Mo. App. 269; *Sawyer v. Taggart*, 14 Bush, 727; *Cockrell v. Thompson* (1885), 85 Mo. 510; *Schneider v. Turner* (1889), 130 Ill. 28, 22 N. E. R. 497; *Greenhood*, Public Policy, ch. 1, part III; *Pritchett v. Insurance Co.*, 3 Yeates, 458; *Edgell v. McLaughlin*, 6 Whart. 176; *Brua's Appeal*, 55 Pa. St. 294; *Maxton v. Gheen*, 75 Pa. St. 166; *Partridge v. Cutler* (1897), 168 Ill. 507, 48 N. E. R. 125; *Waldron v. Johnston* (1898), 86 Fed. R. 757. Compare *Bibb v. Allen*, 149 U. S. 480, 13 Sup. Ct. 950. See also *Seeligson v. Lewis et al.* (1885), 65 Tex. 215. In *Williams v. Tiedemann*, 6 Mo. App. 269, the court said: "Let us now suppose a case in which, when the agreement is made, no delivery is contemplated by either party. It is, in fact, agreed that there shall be no exchange of equivalents, real or supposed. A set-

tlement of differences according to the fluctuations of the market is all that either party intends and all that they contract for. For the money that the seller is to receive, if any, he parts with nothing. For the money the buyer is to pay, if any, he gets nothing. The parties simply wage against each other a contest of skill in predicting future conditions of price. When settlement-day comes, the winner pockets the proceeds, not merely without giving a *quid pro quo*, but without having incurred any obligation in any contingency so to do. This is simply a wagering contract from the beginning, whose demoralizing tendencies are so universally recognized that the courts will not enforce it for either party. The profits realized by the winner are of the same stamp with those which follow the turning of a card or the revolution of a wheel. Nothing is added to the country's commercial prosperity or wealth. There is not even the remote or indirect benefit resulting from the incidental demand in every legitimate transaction to the producer or manufacturer of the product concerned."

In *Brua's Appeal*, 55 Pa. St. 294, it

§ 135. And where the terms of the contract, or the memoranda evidencing the contract, expressly give the right to the seller to deliver and to the buyer the right to demand the delivery of the product or article dealt in, they will be held to express the true intent of the parties, and the burden of showing that a contract, legal and reasonable in its terms, is invalid is on the party charging the illegality.¹

was said: "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another is gambling, and demoralizing to the community, no matter by what name it may be called. It is the same whether the promise be to pay on the color of a card, or the fleetness of a horse, and the same numerals indicate how much is lost and won in either case, and the losing party has received just as much for the money parted with in the one case as the other, viz.: nothing at all. The lucky winner of course is the gainer, and he will continue so until fickle fortune in due time makes him feel the woes he has inflicted on others. All gambling is immoral. I apprehend that the losses incident to the practice disclosed . . . have contributed more to the failures and embezzlements by public officers, clerks, agents and others acting in fiduciary relations, public and private, than any other known, or perhaps all other causes. . . . In the train of its evils there is a vast amount of misery and suffering by persons entirely guiltless of any participation in the cause of it."

To same effect, *Cobb v. Prell*, 16 Cent. L. J. 453; *Union Nat. Bank v. Car*, 16 Cent. L. J. 320; *Rudolph v. Winters*, 7 Neb. 125; *Justh v. Holliday*, 17 Cent. L. J. 56. In this last named case it was held that "where a contract is made for the delivery or acceptance of securities at a future day, at a price named, and neither party at the time of making the con-

tract intends to deliver them or accept them, but merely to pay differences according to the rise or fall of the market, the contract is a gambling one and is void as contrary to public policy. The indorser of a promissory note given on account of such dealings as are recognized as gambling transactions can rely upon their illegality as a defense to an action on the note. In an action to recover money, where the defense set up is that the contract was a stock-gambling one, the real question for determination is the *bona fides* of the transaction. It is not the form, but the intent with which the scheme was planned. If neither party contemplates that there should be a delivery of the stock, but merely to pay differences according to the rise or fall of the market, the contract is a gambling one." In *re Green*, 15 Bankr. Reg. R. 198; *Cassard v. Hinman*, 1 Bosw. 207; *Ex parte Young*, 6 Biss. 53; *Fareira v. Gabell*, 89 Pa. St. 89; *Clarke v. Foss*, 7 Biss. 540; *Gregory v. Wendell*, 39 Mich. 337; *Barnard v. Backhaus* (1881), 52 Wis. 593.

¹*Sampson et al. v. Camperdown Cotton Mills* (1897), 82 Fed. R. 833. After an exhaustive review of the authorities the court, in *Whitesides v. Hunt*, 97 Ind. 191, said: "We conclude from the foregoing authorities that in this class of cases the correct rule is that, where a commodity is bought for future delivery, no matter what the form of the contract is, the law regards the substance and not the shadow, and if the parties mutually understood and intended

§ 136. The mere fact that the seller may, at the time of making the contract, actually own the stocks, bonds or product covered by the contract is not conclusive of the intent of either the seller or the buyer. It may still be shown that it was the mutual understanding and intention of the parties that the transaction should be closed by payment of differences according to the fluctuations of the market.¹

that the purchaser should pay for and the seller should deliver the commodity at the maturity of the contract, it is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin and increase the same like the purchaser in order to secure the delivery at maturity, does not vitiate the contract. But if, at the time of the contract, it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for, nor to be delivered, but that the contract was to be settled and adjusted by the payment of difference in price — if the price should decline, the purchaser paying the difference; if it should rise, the seller paying the advance, the contract price being the basis upon which to calculate differences,—in such case it would be a gambling contract and void, and the deposits of margins are only to be considered as attempting to secure the terms of the bet on prices at some future time.”

¹ Johnson v. Kaune, 21 Mo. App. 22.

Dealings in oil on a margin, and a settling of differences without any intention, from the inception of the transaction, to make *bona fide* purchases, sales and deliveries of the same, are gambling contracts. Taft v. Rieseman, 7 Pa. Dist. R. 496 (1896).

While a purchase of stock on margin for speculation is not gambling

if it is the intention of the parties that a real purchase shall be made by the broker, though delivery be postponed or made to depend on future conditions, it is otherwise if it is the intention that there be no delivery, but that the account be settled on the basis of a rise or fall in prices. Wagner v. Hildebrand, 187 Pa. St. 136, 41 Atl. R. 34 (1898).

A contract for the future delivery of cotton is a wager, where it is not intended that the cotton shall be delivered, but one party is to pay the other the difference between the contract price and the market price at the date fixed for executing the contract. Campbell v. New Orleans Nat. Bank, 74 Miss. 526, 21 S. R. 400 (1897).

Contracts in writing for the sale and delivery of grain at a future day, for a price certain, made with a *bona fide* intention to deliver the grain and pay the price, are valid in law; but when such contracts are made as a cover for gambling, without intention to deliver and receive the grain, but merely to pay and receive the difference between the price agreed upon and the market price at such future day, they come within the statute of gaming, and are void in law. To uphold such a contract, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as an evasion of the statute of gaming, or as a cover for a gambling transaction. In the present case it sufficiently appears that at least some of the transactions between the parties, which

§ 137. **Contract illegal on its face.**—Where a contract on its face contemplates an illegal transaction, no question of intent can be open as a question of fact.¹ It is seldom, however, that contracts covering transactions in "futures" exhibit any evidence of illegality in their terms.²

§ 138. **Both parties must intend to gamble.**—To avoid a contract on the ground that it is a gambling contract it must appear that the illegal intent was common to both parties. The contract is not illegal if either party in good faith intends to fulfill it according to its express terms.³

enter into the consideration of the note and mortgage in suit, were mere gaming transactions of this character, were void in themselves, and taint the whole security, which is, therefore, absolutely void. *Barnard v. Backhaus*, 52 Wis. 593 (1881).

A contract for the purchase of grain is a gambling contract, and void where the mutual intention is to speculate on margins, and no actual delivery is contemplated by either party. *Counselman v. Reichart*, 103 Iowa, 430, 72 N. W. R. 490 (1897).

¹ *Gregory v. Wendell*, 40 Mich. 432.

² It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade; and if, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager and is non-actionable. *Irwin v. Williar*, 110 U. S. 499; *Benjamin on Sales* (Bennett's 8d Am. ed.), 542, and numerous authorities there cited; *Sawyer v. Taggart* (1879), 14 Bush, 729; *Conner & Hare v. Robinson* (1885), 37 La. Ann. 818.

³ *Cassard v. Hinman*, 1 Bosw. 207; *Rumsey v. Berry*, 65 Me. 570; *Front v. Clarkson*, 7 Cow. 24; *Ex parte Young*, 6 Biss. 53; *Brua's Appeal*, 55 Pa. St. 294; *Grizewood v. Blane*, 11 C. B. 538; *Clarke v. Foss*, 7 Biss. 540; *Pickering v. Cease*, 79 Ill. 328; *Pixley v. Boynton*, 79 Ill. 351; *Lyon v. Culbertson*, 83 Ill. 33; *Sawyer v. Taggart*, 14 Bush, 727; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Gregory v. Wendell*, 40 Mich. 432; *Yerkes v. Salomon*, 11 Hun, 471; *Barnard v. Backhaus*, 52 Wis. 593. It is manifest that in order to make a wager both parties must intend it to be such. If one intend a *bona fide* sale or purchase, while the other means only a gambling risk upon prospective differences, there will be no propriety in depriving the former of the benefit of his contract because of a secret reservation in the mind of the latter. As every contract to be enforced must be upon the mutual understanding of the parties, so a contract to be denied enforcement because of its illegitimate composition must have been so contrived in the common interest of the makers, or at least in the interest of him who is to be precluded of its benefits. The law will not presume against the validity of a contract relating to a proper subject-matter. The burden of proof is upon him who alleges its invalidity. *Williams v. Tiedemann* (1878), 6 Mo. App. 269, 275.

§ 139. If, however, at the time of entering into the contract the innocent party is aware of the illegal intent of the other party, the contract is tainted and illegal.¹

§ 140. The rule altered by statute in some states.—In some states dealings in futures are declared to be gambling contracts if one of the parties has no intention of making actual deliveries or actual receipts. These statutory provisions often work great hardship by charging an innocent party with knowledge of the intent of the other party.²

§ 141. Parties in *pari delicto*.—An illegal contract cannot be enforced by either party in case the parties are *in pari delicto*. Where an illegal contract has been performed the courts will not aid either party to place himself *in statu quo* by rescinding the contract. The law leaves the parties where it finds them, giving aid to neither. Nor can money advanced in pursuance of the illegal contract be recovered back.³

¹ Grizewood v. Blane, 11 C. B. 538.

² The supreme court of Tennessee, referring to the statute of that state, said (McGrew v. City Produce Exchange (1887), 85 Tenn. 577, 4 S. W. R. 38): "The argument of counsel that the wagering established in this record was not gaming before the act of 1883 (ch. CCLL), and that this act was a legislative declaration to that effect, is not sound, for two reasons: First, because that act did not declare that the dealing in futures, when neither party intended a real purchase or sale, was gaming, for it always had been so. Second, it declared that thereafter such dealing should be gaming 'if either of the contracting parties, dealing simply for the margin or on the prospective rise or fall of prices, had no intention or purpose of making actual delivery or receiving the property or thing in specie.' Acts of 1883, p. 331. Before the passage of this law such a transaction as dealing in futures, of itself, was not unlawful, nor was it unlawful unless it was the intent of both parties that there should be no real purchase or delivery. This act

was intended to make it unlawful if either had no intention of effectuating a real purchase or sale. It was designed to suppress the evil of dealing in futures and limit such operation to *bona fide* sales and purchases by those who wished to sell to those who wished to buy. In making the seller responsible for the intent of the buyer, and the buyer responsible for the intent of the seller, it intended to suppress gambling by confining the business of buying and selling for future delivery in such limits as would practically preclude the possibility of it. The *bona fide* dealer can still operate, but he cannot do so upon any terms which do not protect the community against the pernicious and ruinous speculation in the rise and fall of prices. He is obliged, for his own safety—as this act provides extreme penalties—to avoid the speculator, and buy only for the legitimate demands of necessity and trade."

³ Smith v. Barstow, 2 Doug. (Mich.) 155; Binnington v. Wallis, 4 Barn. & Ald. 650; Cowan v. Milburn, L. R. 2 Exch. 230; Mosher v. Griffin, 51 Ill.

§ 142. These general propositions are subject, however, to certain important exceptions, as will be seen in the consideration of certain cases involving the formation of illegal combinations. For instance, it will be found that parties to an illegal combination have been permitted to recover possession of their plants and premises after the same had been transferred to the combination by setting up the illegality of the entire transaction. In so far, however, as the right asserted is based upon the enforcement of the illegal contract, the courts will deny relief, and the exceptions will be found in cases where the rights asserted were based upon considerations or equities entirely distinct from the illegal contract and in opposition thereto.

§ 143. **Contracts legal in one state and illegal in another.** It frequently happens that a contract legal in the state where made is sought to be enforced in a state the laws of which would render it illegal if made within that state. It is well settled that a contract valid where made will not be enforced by the courts of another state or country if in doing so some plain rule of morality or public policy is violated, or if the enforcement of the contract would be injurious to the interests or conflict with the operation of the laws of that state or country.¹

184; *Nellis v. Clark*, 20 Wend. 24; *Goudy v. Gebhart*, 1 Ohio St. 262; *Knowlton v. Congress Springs Co.*, 57 N. Y. 518; *Hoover v. Pierce*, 26 Miss. 627; *McWilliams v. Phillips*, 51 Miss. 196; *McCloskey v. Gordon*, 26 Miss. 260; *Broughton v. Broughton*, 4 Rich. (S. C.) 491; *Thomas v. City of Richmond*, 12 Wall. 349; *Setter v. Alvey*, 15 Kan. 157; *Adams v. Barrett*, 5 Ga. 404; *Babcock v. Thompson*, 3 Pick. 446; *Gill v. Webb*, 4 T. B. Mon. (Ky.) 299; *Welsh v. Cutler*, 44 N. H. 561; *McCullum v. Gourlay*, 8 Johns. 147; *Hudspeth v. Wilson*, 2 Dev. (N. C. L.) 372.

¹ *Flagg v. Baldwin* (1884), 38 N. J. Eq. 219; *Thatcher v. Morris* (1854), 11 N. Y. 437. But the enforcement of a foreign law, and contracts dependent thereon for validity, within another jurisdiction and by the courts

of another nation is not to be demanded as a matter of strict right. It is permitted, if at all, only from the comity which exists between states and nations. Every independent community must judge for itself how far this comity ought to extend. Certain principles are well nigh universally recognized as governing this subject. It is everywhere admitted that a contract respecting matter *malum in se*, or a contract *contra bonos mores*, will not be enforced elsewhere, however enforceable by the *lex loci contractus*. An almost complete agreement exists upon the proposition that a contract valid where made will not be enforced by the courts of another country if in doing so they must violate the plain public policy of the country where jurisdiction is invoked to

§ 144. Gambling contracts, contrary to the law or public policy of the country or the state wherein they are sought to be enforced, will not be upheld.¹

§ 145. Corporation organized for the purpose of gambling on the market.—Where several persons organize a corpora-

enforce it, or if its enforcement would be injurious to the interests or conflict with the operation of the public laws of that country. Story's Conf. Laws, § 244.

¹ In *Flagg v. Baldwin*, *supra*, the court said:

"Since the courts of each state must, at least in the absence of positive law, determine how far comity requires the enforcement of foreign contracts, it results that there is contrariety of view, and the proposition above stated is not universally admitted. Thus, in New York, a contract made in Kentucky, under the law of that state, establishing a lottery for the benefit of a college, was upheld, notwithstanding the law of New York prohibiting lotteries. *Com. of Ky. v. Bassford*, 6 Hill, 526. Chief Justice Nelson limited the cases of contracts not enforceable, though valid where made, to such as are plainly contrary to morality. He gave no consideration to the doctrine elsewhere settled that excludes from enforcement contracts opposed to the public policy or violative of a public law of the place of enforcement. In this view he seems to be sustained by the court of appeals. *Thatcher v. Morris*, 11 N. Y. 437.

"So, in Massachusetts, a contract arising out of a completed sale of lottery tickets, in a state where such sale was lawful, was enforced by the courts, although such sale was there prohibited by statute. *McIntyre v. Parks*, 3 Met. 207. But there was no discussion of principles by the court."

In the case last cited the court held that speculation in stocks through a broker, when neither the broker

nor the customer intended that the stock purchased or sold should be actually delivered or treated as the stock of the customer, but that settlement should be made upon differences,—such transactions are unlawful, and any securities given therefor are void in pursuance of statutory provisions. And where such contracts are made in another state, where they may be presumed lawful, still they will not be enforced if unlawful under the law of the forum. Certainly they will not be enforced as against residents and citizens of the state where such contracts are unlawful, because such enforcement would violate the public policy of the state. Such contracts form an exception to that rule of comity which ordinarily requires the enforcement by the courts of one state of contracts made in another.

In *Stewart v. Schall* (1886), 65 Md. 289, 57 Am. R. 327, the plaintiff carried on the business of a stock broker in Pennsylvania, where all parties lived. As broker he dealt in stocks and grain on the exchanges of New York, Chicago, Philadelphia and Baltimore at defendant's request. Action was brought for services, advances and interest, and it was ruled that evidence was competent to show that the transactions were really gambling transactions; and it was held as a matter of law that they were to be governed by the laws of Pennsylvania, and that therefore there could be no recovery. See *Pearce v. Foot*, 113 Ill. 228, 55 Am. R. 414; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. R. 687; *Plank v. Jackson* (1891), 128 Ind. 424, 26 N. E. R. 568.

tion ostensibly for the purpose of dealing in "futures," but in reality for the purpose of gambling upon the rise and fall of prices in the market, the incorporators are individually liable for all sums illegally received on wagering contracts by the managers of the corporation.¹

§ 146. Rights of brokers and principals.—Where the customer is dealing in good faith, intending to actually deliver or receive the grain or stock dealt in, the relations between principal and broker are governed by the familiar rules of law controlling the relationship of principal and agent.

§ 147. Where, however, the customer intends to settle upon differences, complicated questions arise, for the broker may or may not be apprised of the customer's real intention concerning deliveries. A customer may at the outset intend to make actual trades, and in subsequent transactions, as he gets in deeper and deeper, he may intend to settle upon differences, actual deliveries or receipts being entirely beyond his resources. It has been frequently said that the very magnitude of the transactions engaged in by customers, whose circumstances in life are such as to charge the broker with knowledge that actual deliveries and receipts are impossible, is a controlling consideration in the determination of any controversy between them as to knowledge of intent. But in many cases the transactions are comparatively insignificant, the circumstances and resources of the customer unknown, and the broker might be warranted in supposing that the customer could, if necessary, at any time, actually either deliver or receive the stock or grain dealt in. The circumstances and conditions vary so that each case is controlled by its own facts, but the following general propositions may be laid down:

§ 148. Stocks, bonds, grain, provisions, like all other articles, may be dealt in on credit and purchased through the agency of brokers. "Margins," which are nothing more than security given to the broker for his protection, may be deposited; and the mere fact that stocks and grain are more commonly made the vehicle of gambling transactions than other articles does not affect the validity of the transaction, though it may lead the courts to scrutinize more closely large transactions involv-

¹ McGrew v. City Produce Exchange (1887), 85 Tenn. 572, 4 S. W. R. 38.

ing these products and articles to ascertain the true character of the transactions.¹

§ 149. Where a customer having no stock in his possession employs a broker to sell the stock "short," the broker borrowing stock to make the delivery, and afterwards, under direction of his customer, buying in the stocks at a higher price, the broker may recover from the customer the difference, provided the broker is acting throughout in good faith and had no knowledge that at the time of the sale it was the customer's intention to gamble upon differences. If, however, the broker is advised that it is the intention of the customer to gamble upon differences, he cannot recover any losses sustained in the transaction.²

¹ Hopkins v. O'Kane (1895), 169 Pa. St. 478, 32 Atl. R. 421; Peters v. Grimm (1892), 149 Pa. St. 163, 24 Atl. R. 192.

² In Dickson's Ex'r v. Thomas (1881), 97 Pa. St. 278, A. directed B, a stock broker, to sell on his account five hundred shares of stock "short." It did not appear whether A. owned the stock or not. He gave no certificate to B, and arranged with him that there was to be no actual delivery of the stock between them, but that A. was to protect B. from loss if the market value of the stock advanced, and receive the difference in value from B. if it declined. There was no agreement that B. should not make actual delivery of the stock he was instructed to sell. B. sold accordingly, and afterwards the price rose. B. then borrowed from a fellow-broker the necessary certificates to make delivery, and did deliver them and receive payment therefor through his clearing-house sheet. The price still rising, B. subsequently bought on A.'s order five hundred like shares to make good his loan, receiving them and paying for them also through his clearing-house sheet. He paid also to the lender the amount of an immediate dividend for A.'s use in those transactions; the facts dis-

closed stamped the transaction as a mere gambling contract between the plaintiff and the defendant, which was contrary to the policy of the law, and that, therefore, the former was not entitled to recover.

The fact that a cotton mill corporation purchases cotton for future delivery, through a broker, and puts up margins necessary to carry it, does not render the purchases *ultra vires*, if they were not in fact speculations on the rise and fall of cotton, but were made in the ordinary and legitimate business of the mill for its own use. Where such contracts are not illegal in their origin, the carrying of them, and paying from time to time the margins on them, are not invalid if their purpose is to save the corporation from loss. Sampson et al. v. Camperdown Cotton Mills (1897), 82 Fed. R. 833. See also Morris v. Norton (1896), 75 Fed. R. 912.

The plaintiffs in good faith, at the request and for the benefit of the defendant, made an agreement for the sale of wheat to be delivered within a certain time at the option of the defendant, he to furnish sufficient "margin" to secure them against loss. The defendant failed to comply with his part of the contract, and a loss ensued. Under such a contract

§ 150. But, even though a broker and his customer are engaged in gambling transactions, if the customer afterwards demands a delivery of the stock, and the broker agrees thereto, this agreement is valid and may be enforced, and the customer is liable for the price of the stock or product.¹

§ 151. A broker cannot recover money advanced to pay losses incurred, nor can he recover his commissions for services in transactions which he knew, or under all the circumstances ought to have known, were gambling transactions.²

the law will give to the plaintiffs a remedy for their loss. *Rumsey v. Berry*, 65 Me. 570 (1876).

¹ *Anthony v. Unangst* (1896), 174 Pa. St. 10, 34 Atl. R. 284

A judgment entered on a judgment note given to a broker to secure margins will not be opened where the evidence shows that the broker, at defendant's request and with defendant's money, bought shares of stock, and received and retained the certificates until at defendant's request they were sold again; that the proceeds of the stock were retained by the broker, and used by him in part payment of other stocks purchased at defendant's request; and that the purchase and sale of stocks continued in this way until the defendant was in the broker's debt, when the judgment note was given to secure the balance due. *Hopkins v. O'Kane*, *supra*; *Peters v. Grimm*, *supra*.

The sale of cotton to be delivered at a future day, where both parties are aware that the seller himself expects to purchase to fulfill his contract, and no skill and labor or expense enter into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of law, and can be enforced by neither party. But where such a contract is executed, an agent who may be employed by his principal to make the contract can recover from him any money advanced in the

transaction by his authority. *Thompson Bros. et al. v. Cummings & Co.*, 68 Ga. 124. See *Cunningham v. National Bank of Augusta* (1882), 71 Ga. 400. Compare *Commisky et al. v. Williams* (1886), 20 Mo. App. 608.

² *Fareira v. Gabell* (1879), 89 Pa. St. 89; *Dickson's Ex'r v. Thomas*, 97 Pa. St. 278.

In an action by an assignee of a firm of brokers to recover a balance alleged to be due in the purchase and sale of stocks, it appeared that the accounts between the firm and the defendant covered a period of fifteen months, and involved purchases amounting to over \$300,000, during which time no securities were delivered or tendered except one purchase of stock for a special purpose amounting to \$100. The calls on defendant were not to take up his stocks and bonds, but to deposit more margin. When the brokers were carrying securities to the amount of \$150,000, they wrote to defendant that in ordinary times a margin of five per cent. would be required, and that while they did not ask that he should put up that much, they desired that he should better protect his holdings, and added: "We will gladly allow you to withdraw money again as soon as the market improves." In addition to this, defendant testified that there was an understanding and agreement that he would not be called on to pay for the securities, but that the account would be settled

§ 152. Money loaned or advanced to further gambling transactions cannot be recovered back.—Whoever loans money for the purpose of furthering a gambling transaction cannot recover the same.¹

§ 153. The original payee cannot recover on a note, the consideration of which was money advanced by him for the carrying out of a gambling contract, if he is a party to such contract or participated in the making of it on behalf of one of the parties thereto.²

by the payment of the difference in prices. There was other testimony to the same effect. Verdict and judgment for the defendant were sustained. *Louis Wagner, Assignee of Henry S. Loucheim and Frederick Leser, trading as H. S. Louchheim & Co. v. Otto C. Hildebrand*, 187 Pa. St. 136, 137, 41 Atl. R. 34 (1898).

¹ *Waugh v. Beck* (1886), 114 Pa. St. 422, 6 Atl. R. 923. It is not enough to defeat recovery by the lender that he knew of the borrower's intention to use it in a gambling transaction in purchasing commodities on margin; he must have known that the borrower was purposing such use of the loan, and must have been implicated as a confederate in the transaction, though not necessarily for gain.

² *Embrey v. Jemison* (1889), 131 U. S. 836, 9 Sup. Ct. R. 776. In this last case the supreme court of the United States reviewed the law as follows: "It is contended that this is not an action upon the original contract, but upon the notes executed by Embrey after the business transacted for him by Moody & Jemison was closed, and with full knowledge, upon his part, of all the facts. In such a case, it is argued, the principles announced in *Irwin v. Williar* cannot be applied. This argument concedes, at least for the purposes of the present case, that as the law for the protection of the public and in the interest of good morals declares a

wagering contract to be void, the plaintiff could not maintain an action for the moneys advanced in execution of the original contract to carry these 'futures.' And yet it is insisted that he ought to have judgment on the notes in suit, although it appears they have no other consideration than the moneys so advanced. A judgment upon the notes would, in effect, be one for the amount claimed by the plaintiff under the original contract at the time he demanded their execution by the defendant. Indeed, it has been held that a note could not of itself discharge the original cause of action, unless, by express or special agreement, it was received as payment. *Sheehy v. Mandeville*, 6 Cranch, 253, 264; *Peter v. Beverly*, 10 Pet. 532, 568; *The Kimball*, 3 Wall. 37, 45.

"While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that upon principle the original payee cannot maintain an action on a note, the consideration of which is money advanced by him upon or in execution of a contract of wager. he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties.

"In *Steers v. Lashley*, 6 T. R. 61, it appeared that the defendant was engaged in stock-jobbing transactions with different persons, in which one Wilson was employed as his broker

§ 154. In such a case the burden of proof is upon the maker of the note to show that the note was a part of a gambling transaction.¹

and had paid the 'differences' for him. A dispute having arisen as to their amount, the matter was referred to the plaintiff and others, who awarded a certain sum as due from the defendant. For a part of that sum the broker drew a bill on the defendant, and, after it had been accepted, indorsed it to the plaintiff. Lord Kenyon said: 'If the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then, according to the principle announced in *Petrie v. Hannay*, 3 T. R. 418, he might have recovered. But here the bill on which the action was brought was given for these very differences; and therefore Wilson himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant; for he was the arbitrator to settle their accounts; and under such circumstances he cannot be permitted to recover on the bill in a court of law.'

"In *Amory v. Merryweather*, 2 B. & C. 573, 578, which was an action of debt on bond conditioned for the payment of money by instalments, the plea in substance was that the bond was given in place of a promissory note previously executed in payment for moneys advanced by an agent of the obligor in discharge of differences arising upon contracts for buying and selling shares in the public stocks, against the form of the statute; the plaintiff having knowledge, when he received the bond, that the note had been made by the defendant on the occasion and for

the purpose stated. Abbott, C. J., after observing that there was no period of time when the plaintiff could have maintained an action upon the note, said: "We are all of opinion that as it appears upon the plea that the bond was given as a substitute for a note which was taken by the plaintiffs subject to an infirmity of title of which they had full notice before the bond was taken, the latter instrument is void.'

"In *Fisher v. Bridges*, 3 El. & Bl. 642, 649, which was an action upon a covenant in a deed to pay a certain sum, and which covenant was given as security for payment of a part of the purchase-money of real estate sold by the plaintiff to the defendant, to be by the latter disposed of by lottery, as the plaintiff knew, the court said: 'It is clear that the covenant was given for the payment of the purchase-money. It springs from and is the creature of the illegal agreement, and as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase-money, which, by the original bargain, was tainted with illegality.' See also *Fareira v. Gabell*, 89 Pa. St. 89; *Griffiths v. Stears*, 112 Pa. St. 523; *Flagg v. Baldwin*, 38 N. J. Eq. 218, 227; *Cunningham v. Bank of Augusta*, 71 Ga. 400; *Tenney v. Foote*, 95 Ill. 991; *Rudolf v. Winters*, 7 Neb. 126; *Lowry v. Dillman*, 59 Wis. 197, 18 N. W. R. 4.

"Assuming the averments of the plea of wager to be true, it is clear that the plaintiff could not recover upon the original agreement without disclosing the fact that it was one that could not be enforced or

¹ *Embrey v. Jemison*, *supra*.

§ 155. Custom and usage of the market.—A person dealing at a particular market will be taken to have dealt according to the known general custom and usage of that market; and if he employs another to act for him in buying or selling at such market, he will be held as intending that the business should be conducted according to such general usage and custom of such market; and this has been held to be the rule whether he in fact knows of the custom or not.¹

§ 156. Effect of rules of board of trade and stock exchange.—Where a customer deals with a broker on a board of trade or stock exchange he thereby confers upon the broker

made the basis of a judgment. He cannot be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected with, a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell v. Hall*, 7 Wall. 542, 558; *Embrey v. Jemison*, 131 U. S. 336, 346, 349 (1889), 9 Sup. Ct. R. 776.

Compare *Faihney v. Raynons*, 4 Burr. 2069; *Planters' Bank v. Union Bank*, 16 Wall. 500; *Knight v. Cambers*, 80 E. C. L. 561; *Hacker v. Hardy*, 4 L. R. Q. B. 685; *Durant v. Burt*, 98 Mass. 161; *Lehmann v. Strassburger*, 2 Woods, 554; *Conner & Hare v. Robertson*, 37 La. Ann. 814 (1885)."

¹ *Baily v. Bensley* (1877), 87 Ill. 556; *Doane et al. v. Dunham* (1875), 79 id. 131; *Lyon et al. v. Culbertson et al.* (1876), 83 id. 33; *Lonergan v. Stewart* (1870), 55 id. 44; *Home Ins. Co. v. Favorite* (1867), 46 id. 263; *Lawson on Usages*, 47, 284-287.

Where a transaction involving the purchase of stocks on the market is in fact a real purchase under an authorized contract, the customs of the market may be considered in construing the contract and in interpreting the otherwise indeterminate intention of the parties. *Taylor v. Bailey et al.* (1897), 169 Ill. 181, 48 N. E. R. 200.

The fact that one did not direct that his stocks should be purchased in a certain market does not affect the rule that he is bound by the customs of the market where they were in fact purchased, if, with knowledge of the place of the purchase, he assented thereto and agreed to take and pay for the stocks. *Taylor v. Bailey et al.*, *supra*.

authority to deal according to the well-settled usages and the rules and regulations of such market. And where such rules and regulations are known to the customer, and are fair and do not change in any essential part the contract between the customer and the broker, and do not involve any departure from the customer's instructions, they are binding.¹

¹ Bibb v. Allen (1892), 149 U. S. 481, 13 Sup. Ct. R. 950. In this case the court said:

"Upon the third assignment of error, which presents the question whether the transactions in which the parties were engaged were illegal because they were wagering contracts under the New York statute against wagers, bets, etc., the evidence in the case clearly fails to make out such a defense. In entering into their arrangement it is shown by the correspondence and by other testimony in the case that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery was not in fact to be actually delivered. In their correspondence as to the terms on which the agency was to be undertaken, the plaintiffs were distinctly informed that the defendants did a large business for the best and most reliable people of their locality; that they would hold themselves personally responsible for all orders sent, and hold their correspondents responsible for all orders executed as to margins; that they handled, sometimes, from three thousand to five thousand bales of cotton a day, and that their customers dealt in orders for from five hundred to one thousand bales at a time, and were entirely responsible. It was also testified by both the plaintiffs and defendant Bibb that there was no understanding or agreement, either express or implied, between them at the time of entering upon the transactions or during their progress, that the cotton sold for ac-

count of the principals was not to be delivered at the time stipulated in the contracts of sale made for their account. It is not questioned that if the transactions in which the parties are engaged are illegal, the agent cannot recover either commissions for services rendered therein, or for advances and disbursements by him for his principal (Story on Agency, §§ 330, 344, and authorities cited), the reason for this rule being that in such illegal transactions of which the agent has knowledge he is regarded as *particeps criminis*, which precluded him from the recovery of either commissions or advances. Irwin v. Williar, 110 U. S. 499, 510.

"But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions fails to show that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. In addition to this it is shown that the rules and regulations of the New York Cotton Exchange recognized

§ 157. **Presumption of law.**—The presumption of law is in favor of the validity of a contract the terms and subject-matter of which are proper, and the burden of proof is on him who assails its validity.¹

§ 158. The law presumes that the true intention of parties to a contract is expressed upon the face of the contract. The law further presumes that men do not intend to violate the law or enter into contracts which the law will not enforce.²

§ 159. It is frequently said that it is the duty of courts to scrutinize closely all dealings in “futures,” and it is sometimes said that, if the circumstances are such as to throw doubt upon the real intention of the parties, the party claiming rights under such contracts may be required to show affirmatively that they were made with *bona fide* intentions.³ The circumstances which throw doubt upon the question of the true intention of the parties should be such as to amount to affirmative evidence of an illegal intention, otherwise the burden of proof should not shift to the party claiming under the contract.

§ 160. **Burden of proof as to intent.**—Except where it is provided by statute that illegal intent on one side renders the contract illegal, the burden of proof of showing that both parties intended to settle upon differences is upon the party asserting the invalidity of the contract.⁴

no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases which have no application to the present case.

“These rules, which were authorized to be made by the statute of the state of New York, under which the Exchange was incorporated, enter into and form part of the contracts of sale in this case. The defendants in one of their earliest communications to the plaintiffs informed them that they would use in their telegraphic correspondence what was known as Shepperson’s code, which provided that ‘unless otherwise

stated as agreed, it is distinctly understood that all orders sent by this chapter are to be subject in every respect to the by-laws and rules of the market where executed;’ and further, that ‘with every telegram sent by this table the following sentence will be read as a part of the message, viz.: this sale has been made subject to all the by-laws and rules of our cotton exchange in reference to contracts for the future delivery of cotton.’” See also *Whitesides v. Hunt* (1884), 97 Ind. 191.

¹ *Williams v. Tiedemann, supra.*

² *Conner & Hare v. Robertson, supra.*

³ *Cobb v. Prell* (1883), 15 Fed. R. 774.

⁴ *Commisky et al. v. Williams, supra.*

§ 161. In the absence of evidence tending to show an agreement to settle upon differences, it is error to submit to the jury the question whether a contract for "futures" is a wager.¹ Where a contract, somewhat doubtful in its terms, may be construed either as legal or illegal, the court will adopt that construction which makes it legal, and the burden of proof is on him who alleges its illegality.²

¹ Commisky et al. v. Williams, *supra*.

² Clay, Ex'r, v. Allen & Co., *supra*.

The rule which has generally prevailed is that the burden is upon the party claiming that such contract is invalid to establish by a preponderance of the evidence that neither party intended that there should be any delivery of the property. But in view of the number and extent of such contracts entered into in the great trade centers of this country, with no intention on the part of any one that the property shall be delivered, but that the transaction shall be closed by a mere payment of the differences, *quære*, whether, when the circumstances are such as to throw doubt upon the intention of the parties, a party claiming rights under such a contract should not be required to show affirmatively that it was made with a view to the actual delivery and receipt of the property. See cases cited in opinion. First Nat. Bank of Lyons v. Oskaloosa Packing Co., 66 Iowa, 41 (1885), 23 N. W. R. 255.

Judge Gresham stated the rule as follows (Williar v. Irwin, 11 Biss. 57, 60, 30 Fed. Cases, 38): "The burden of showing that the parties were carrying on a wagering business and were not engaged in legitimate trade or speculation rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that parties are gambling. A person may make a contract for the sale of personal property for future delivery

which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate cannot be held void as a wagering contest by showing that one party only so understood and meant it to be. The proof must go further and show that this understanding was mutual; that both parties so understood the transaction. If, however, at the time of entering into a contract for the sale of personal property for future delivery, it be contemplated by both parties that, at the time fixed for delivery, the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager and nothing more."

Other cases might be cited in which the same rule is applied to these contracts for the sale and purchase of grain on the board of trade as is applied to every other contract, namely, that presumptively they are legal and valid, and that the burden is not, in the first instance, upon the plaintiff to show that the contract was not an evasion of the statute or a cover for a gambling transaction. The supreme court of the United States in Irwin v. Williar, 110 U. S. 507, 508, 4 Sup. Ct. R. 160, expressly quoted from the opinion of Judge Gresham, "and I must therefore hold that the burden here is not upon the plaintiff to make it satisfactorily and af-

§ 162. The same rule is applied to contracts for the sale and purchase of grain on a board of trade as is applied to other contracts, namely, that presumptively they are legal and valid. This presumption is not overcome by one party testifying that his own intention was illegal.¹

firmatively appear that the contracts in question were legal, but that it is incumbent upon the defendant to show that the contracts were in fact gambling transactions; and this is not shown by merely proving his own intention in the transaction." Ward v. Vosburgh (1887), 31 Fed. R. 13.

¹ Ward v. Vosburgh (1887), 31 Fed. R. 13.

"It is very easy for either party to swear to what his own understanding of the contract was, but that, standing alone, is manifestly immaterial. The secret intentions of one party, contrary to what appears on the face of the contract, and not communicated to the other party, cannot prevail to make a contract illegal which is otherwise valid. The real question is, What was the contract? and that implies an inquiry as to the mutual understanding and meeting of the minds of the parties. What was that? It is easy for a party to swear what his own understanding and intentions were; but, when he comes to swear to the intentions and understanding of the other party, the consideration due to his testimony stands on an entirely different footing. He may be presumed to know his own intentions, but the evidence of the intentions of the other party should not be of a merely subjective character, but should consist of tangible facts and circumstances outside of his own consciousness, and a knowledge of which would be capable of satisfying other minds." Clarke v. Foss, 7 Biss. 548.

In Bangs v. Hornick, 30 Fed. R. 97, Judge Brewer, in his opinion, says:

"Counsel for defendant say that it is the absolute duty of the court to denounce this transaction, unless it clearly appears that it was a valid and honest one. I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it, unless it appears that it was an invalid and dishonest one."

The weight of authority, therefore, in this circuit, is all one way, as applied to Illinois transactions, namely, that a simple option reserved by the seller to himself as to time of delivery of property within certain limits, and the settlement of differences upon such a contract, does not make the contract void as a gambling transaction. The proofs must go further, and affirmatively show that it was not the intention of either seller or buyer when the contract was made to deliver any property; and this is not proved by showing merely the intention of one party, even coupled with the intention of his agent representing him in the transaction. Ward v. Vosburgh, *supra*.

In Whitesides v. Hunt, 97 Ind. 191, the court said:

"It is evident from the evidence in the case under consideration, that appellant's understanding and intention was only to engage in a speculation on prices. The small nibble that he had previously made at the hook only induced him to bite again, with a hope of getting a larger bait. But the evidence is very meagre as to the surroundings of the appellant; it does not show his business or occupation; whether he was a miller and wanted to purchase wheat for manufacturing purposes, or a shipper and wanted

§ 163. Evidence.— Where the circumstances are such as to indicate that the parties had no real intention to make deliv-

the wheat for transfer and legitimate commerce, or whether he was a mere adventurer guessing upon prices, and willing to risk his money upon the hazard, without any ability to pay the contract price, is not developed in the evidence. Nor does it appear from the evidence that the appellees were interested in, knew anything about, or made any inquiry in relation to, appellant's ability to pay for the wheat. The only thing they required was the putting up of sufficient margins to cover shrinkage in prices, and the only inquiry they made was as to the appellant's ability to pay losses. To secure the decline in prices was all they appeared to care for. But notwithstanding these circumstances, tending to show a mutual understanding between the parties that the wheat was not to be paid for or delivered, in the rebutting evidence, Mr. Fesler testified that the wheat would have been delivered at the maturity of the contract if the margins had been kept good to that time.

"Mr. Lee Hunt, one of the plaintiffs, also testified that at the time of the sale there was no intention that the wheat should not be delivered at the maturity of the contract, if the margins were kept good; and if this had been done the wheat would have been delivered to the defendant at the maturity of the contract; that, according to the books of the Chicago Board of Trade, this wheat was delivered to the subsequent purchaser upon the original contract at its maturity. According to the well known practice, under the rules and regulations of the Chicago Board of Trade, the fact that the books showed a delivery of the wheat, if legitimate testimony for any purpose, furnished but very slight evidence of an actual

delivery of the wheat. Still this rebutting evidence clearly tends to show that the intention not to deliver the wheat, at the maturity of the contract, was not mutual. And if either party contracts in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other. *Rumsey v. Berry*, 65 Me. 570; *Williams v. Carr*, 80 N. C. 294; *Gregory v. Wendell*, 39 Mich. 337.

"The burden of the defense rests upon the defendant. *Wright v. Crabbs*, 78 Ind. 487; *Parker v. Hubble*, 75 Ind. 580."

In *Roundtree v. Smith* (1882), 108 U. S. 269, 275, 2 Sup. Ct. R. 630, the supreme court said:

"The counsel for defendant resisted recovery against him, on the ground that the sales and purchases made for him by plaintiffs were gambling contracts on the prices of the various article of produce to which they related, never designed to be actually performed by delivery, but the damages were to be adjusted and payments made and accepted according to the difference between the contract price and the market price at the date fixed for delivery. And on this subject he asked certain instructions of the court, which were refused. The court also charged the jury that there was no evidence on this subject which they could consider. An exception was then taken to this ruling, and a bill of exceptions purports to embody all the testimony.

"The evidence of the defendant on this point was that he gave the instructions to buy. He says: 'I could not say that I had any understanding on the subject of the nature and character of the board of trade

eries, but intended to settle on differences, it is proper to admit evidence as to ability of either party to fulfill the contracts entered into.¹

deals, whether property was to be actually delivered or whether it was to be settled for.'

"It is obvious that so far as plaintiff, one of the parties to all these contracts which he now impeaches, is concerned, they were not gambling contracts, and that he had no understanding or agreement, expressed or implied, that they were bets upon the future price of the article.

"The other party to these contracts, or rather parties (for the contracts were numerous), are not produced, nor their testimony given, and there is no direct evidence that any of them either bought or sold with any other purpose than to perform the agreement as its terms bound them.

"The plaintiffs, in answer to questions on this subject, say that in no instance had they any agreement with the parties to the contracts made by them for Mr. Roundtree, that performance was not expected or intended, but a mere adjustment of differences, and they say that actual delivery of the article was made in some of them. So that as to these contracts, in regard to which the services were rendered and money advanced by plaintiff for defendant, there is no evidence whatever that they were not *bona fide* contracts, enforceable between the parties, and made to be performed.

"Evidence was given that a very large proportion of all the contracts made for the sale of produce at the board of trade of Chicago were settled by payment of differences, and that nothing else was expected by the parties to them, and the number of these in proportion to the number of *bona fide* contracts, in which delivery was expected and desired, is

said to be so large as to justify the inference that it was so in these cases.

"But since the plaintiff testifies that he had no such understanding, since nothing is proved of the intention of the other parties, and since the contracts were always in writing, we do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law, or to justify a jury in making such a presumption."

¹In *Kirkpatrick et al. v. Bonsall* (1872), 72 Pa. St. 155, the defendants agreed to deliver to plaintiff five thousand barrels of oil at any time within the first six months of the year following the date of the agreement, and in consideration of the agreement received \$1,000. The agreement contained the following provision: "If this oil is called for, this call becomes a contract, ten days' notice shall be given, and (the plaintiff) or his assigns agree to receive and pay for the same cash on delivery, at ten and one-half cents per gallon," etc.

This agreement the court held valid upon its face; but while such an option may be legal, it must be considered in connection with all the other evidence in the case to ascertain whether it is part of a gambling scheme. In this particular case the plaintiff was neither a refiner of oil nor a purchaser for his own consumption, and it plainly appeared that it was not his intention to call for the oil if the price of oil had gone below the contract price; and the plaintiff was permitted to testify as to what contracts he had, if any, when he entered into this option contract; and

§ 164. In an action upon a contract for the delivery of stock at a future day, it has been held that plaintiff may be asked whether at the time of making the contract he intended to call for the stock or merely settle the differences.¹

the court considered it competent to show by other evidence plaintiff's financial inability to take up the option and pay for the amount of oil specified in the contract. The weight and competency of such testimony may well be doubted in view of the consideration urged in section 165.

In Foll's Appeal (1879), 91 Pa. St. 435, 437, it was said:

"While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A national bank is a *quasi*-public institution. While it is the property of its stockholders and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation. It furnishes a place, supposed to be safe, in which the general public may deposit their moneys, and where they can obtain temporary loans upon giving the proper security. There are three classes of persons to be protected: the depositors, the note holders, and the stockholders. We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock, as now held, is scattered among a variety of people and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors who use it for the safe-keeping of their moneys, or the business public who look to it for accommodation in the way of loans, are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such way

that one man and his friends shall control it. Especially is this so when an attempt is made to control it by the use of borrowed capital. The temptation to use it for personal ends in such case are very strong. It is a fact to which we cannot close our eyes, that the financial wrecks of such institutions with which the pathway of the last few years is so thickly strewn are the result, in a great measure, of personal management. This purchase has not even the merit of being an investment on the part of the plaintiff. When a man buys and pays for stock with his own money, it may be regarded as an investment. When he buys it upon credit, or pays for it with borrowed money, it is a mere speculation. Were we to affirm this decree, I see no reason why we may not be called upon to use the extraordinary powers of a court of equity to assist in miscellaneous stock-jobbing operations. A party who is attempting to make a 'corner' in stock or in any article of merchandise, who had made his contracts with that end in view, might, with equal propriety, call upon us to decree specific performance thereof. But the decree of a chancellor is the exercise of a sound discretion; it is of grace, not of right, and will never be made where the equity and justice of a case is not clear."

¹ Yerkes v. Solomon (1877), 11 Hun, 471. "The plaintiff was asked the following question: 'Was it your intention at the time these contracts, or either of them, were made, to tender or call for the stock, or merely to settle upon the difference?' and on objection it was excluded. The defense interposed was that the con-

§ 165. This broad proposition is a dangerous rule. As has been remarked, "it is very easy for either party to swear to what his own understanding of the contract was, but that, standing alone, is manifestly immaterial. The secret intentions of one party, contrary to what appears on the face of the contract, and not communicated to the other party, cannot prevail to make a contract illegal which is otherwise valid. The real question is, What was the contract? And that implies an inquiry as to the mutual understanding and meeting of the minds of the parties."¹ The rule puts a premium upon false swearing; for it is obvious that the testimony of the unscrupulous witness as to his own intentions would depend entirely upon his interest in the litigation. Furthermore, the secret intentions of one side have no bearing whatsoever upon the intentions of the other party, and in all states, except those wherein the statute expressly provides that illegal intent on the part of one side vitiates the contract, it is essential to prove affirmatively that both

tracts were wagers, and if it was the intention of the parties to settle the difference, as they subsequently did, and not to deliver or accept the stock, the defense would be established on the authorities. The statute declares that all stakes, etc., made to depend upon any chance, casualty, or unknown or contingent event whatever, shall be unlawful. And further, that all contracts for or on account of any money or property, or thing in action so wagered, bet or staked, shall be void. The form of the contract does not decide the question, because it would not be difficult to make the contract relating to the bet apparently unlawful, while the intent with which it was entered into was to avoid or evade the statute. It is not the form in which the trick or device is presented, but the intent with which it is planned. When the question was asked, therefore, as to the intent, the subject was opened and the inquiry was pertinent. The authorities are abundant upon the proposition that if neither party intended to deliver or accept the shares, but merely to

pay differences according to rise or fall of the market, the contract is for gaming. *Grizewood v. Blane*, 73 Eng. Com. Law, 525; *Brua's Appeal*, 55 Pa. St. 298; *Cooke v. Davis*, 53 N. Y. 318; *Cameron v. Durkheim*, 55 id. 425; *Peabody v. Speyers*, 56 id. 230; *Bigelow v. Benedict*, 16 N. Y. S. C. R. 429; *Story v. Salomons*, Com. Pleas (MS. opinion by Van Hoesen, J.) The intent of the plaintiffs was one step in the defense, and when the attempt to prove it was rejected, the defendant secured the advantage of an exception. In *Cassard v. Hinman*, 6 Bosw. 14, the question asked was, 'at the time of the making the writings between you and Cassan, was anything said by Nathan (the broker) as to the performance by receipt and delivery of pork, or the settlement by payment and receipt of differences, and if so, what?' The question was excluded, and it was held to have been erroneously ruled upon. The inquiry was held relevant to the defense, which was substantially that the contract was a wager."

¹ *Clarke v. Foss*, 7 Biss. 548.

sides intended to gamble. Short of the express admission of both parties that it was their intention to gamble, such intention can be proven only by facts and circumstances which tend to show such illegal intention. If the facts and circumstances in evidence are sufficient to show such illegal intention, then the testimony of the party alleging the invalidity of the contract that it was his secret intention to gamble is superfluous. If the facts and circumstances in evidence are not sufficient to show illegal intent on both sides, then the testimony of one party as to his own secret intentions lends no additional weight.¹

¹ In *Rumsey v. Berry* (1876), 65 Me. 570, the supreme court of that state, in passing upon the evidence, said:

"The testimony, so far as reported, reveals nothing inconsistent with an ordinary sale of an article to be delivered in the future. While it may indeed appear a little singular and even suspicious that a man residing in Bangor, having no wheat of his own, should undertake to sell and deliver wheat in Chicago, still we cannot assume that any one has violated the law and has been guilty of immoral and corrupting practices in his business transactions, without proof, even though he may ask it himself, for the purpose of being relieved from the obligation of a losing contract.

"Besides, we utterly fail to discover any wrong on the part of the plaintiffs. Their business was a legitimate one, and, so far as appears, their connection with this transaction honest. Their profits were not to be affected by the result, their commissions were not to be increased or diminished by any contingency. It is true they were aware that the defendant at the time had no wheat. But the fact itself being immaterial, their knowledge of it is equally so. It is not only common, but perfectly legal and sometimes necessary, to contract for the sale and future delivery of an article which at the time has no existence, but which is after-

wards to be purchased, raised or manufactured.

"It does not appear that the defendant had any intention beyond what appears upon the face of the contract, or, if he had, that the plaintiffs were cognizant of it. The mischief and illegality arises when the apparent contract is not the real one; when it is a mere cover for ulterior designs and such as are not authorized by law. A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure." See also *Cothran v. Ellis et al.* (1888), 125 Ill. 496, 16 N. E. R. 646; *Barnard v. Backhaus* (1881), 52 Wis. 593, 9 N. W. R. 595; *Pope v. Hanke* (1894), 155 Ill. 617, 621, 40 N. E. R. 839; *Jamison v. Wallace* (1897), 167 Ill. 388, 395, 47 N. E. R. 762.

§ 166. The question of intent is for the jury.— The intention of the parties is a question for the jury, to be determined from a consideration of all the evidence in the case. The jury may consider the manner and method of carrying on the business; the situation and circumstances in life of the party selling; the pecuniary ability of the party making the purchase; the fact that the products or articles dealt in are never called for by the parties to the transactions; that only margins are required; that the transactions are far in excess of the resources of the parties, and so on, in so far as notice of these various conditions is brought home to the adverse party, together with all the circumstances and evidence in the case.¹

¹ Pope v. Hanke, *supra*; Irwin v. Carroll v. Holmes, id. 458; Kennedy v. Stout, 26 id. 133; Miles v. Andrews, *supra*; Gregory v. Wendell, 40 id. 155; Pearce v. Foote, 113 Ill. 250; North v. Phillips, 89 Pa. St. 228; Ruchisky v. De Haven, 97 id. 202; Beveridge v. Hewitt, 8 Ill. App. 467; Griswold v. Gregg, 24 id. 384; Cothran v. Ellis, *supra*; Brand v. Henderson, *supra*; Tenney v. Foote, 95 Ill. 99; Jamison v. Wallace, *supra*.

• **PART III.**

COMBINATIONS AND CONSPIRACIES.

- CH. 5. COMBINATIONS AND CONSPIRACIES DEFINED.**
- 6. LEGAL COMBINATIONS.**
 - 7. CASES SUSTAINING COMBINATIONS.**
 - 8. SOME GENERAL CONCLUSIONS FROM CASES SUSTAINING COMBINATIONS.**
 - 9. ILLEGAL COMBINATIONS.**

CHAPTER 5.

COMBINATIONS AND CONSPIRACIES DEFINED.

- § 167. A combination defined.**
- 168. A legal combination defined.**
- 169. An illegal combination defined.**
- 170. Law of illegal combinations a part of the law governing conspiracies.**
- 171. Conspiracy defined.**
- 172. Civil and criminal conspiracies.**
- 173, 174. Legal combinations.**
- 175, 176. The object of every combination.**
- 177. The magnitude of a combination as bearing upon its character.**
- 178-180. Almost infinite variety of legal combinations.**
- 181. A small combination may be as obnoxious to the law as a large one.**

§ 167. A combination defined.—A combination is simply the co-operation of two or more persons to achieve a given result.

§ 168. A legal combination defined.—A legal combination is the co-operation of two or more persons to do that which is contrary to neither law nor public policy.

§ 169. An illegal combination defined.—An illegal combination is the co-operation of two or more persons to do something which is contrary to law or public policy.¹

¹ A combination is a conspiracy in the public, or oppress individuals, by law whenever the act to be done has unjustly subjecting them to the a necessary tendency to prejudice power of confederates, and giving

§ 170. The law concerning illegal combinations is a part of the law governing conspiracies. It is not conceivable that a combination of two or more persons can be in and of itself illegal unless it amounts to a civil or criminal conspiracy. In fact "conspiracy" is the term which embraces illegal combinations. Combination is the generic term of which conspiracy is the illegal species. The phrase "illegal combinations" is used so commonly in decisions affecting combinations that it is necessary to retain it as a component part of the literature of the subject; but an illegal combination must amount to either a civil or a criminal conspiracy, else the combination is not illegal.

§ 171. Conspiracy defined.—Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive or immoral; or (b) something that is not unlawful, oppressive or immoral by unlawful, oppressive or immoral means; (c) something that is unlawful, oppressive or immoral by unlawful, oppressive or immoral means.

The broad definition of conspiracy is made necessary in view of numerous decisions wherein combinations have been held illegal, neither the object nor the means of which were contrary to law, but were simply oppressive.¹

effect to the purpose of the latter, whether of extortion or mischief. Wharton, Am. Crim. Law, 2322.

¹ 3 Chitty's Crim. Law, 1139 (1841): "There are, perhaps, few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal. Certain it is that there are many cases in which the act itself would not be cognizable by law if done by a single person, which becomes the subject of indictment when effected by several with joint design."

It is sufficient if the end proposed or the means to be employed are, by reason of the power of combination, particularly dangerous to the public interests or injurious to some individual, although not criminal. Colt, J., in Com. v. Waterman, 122 Mass. 43.

3 Chitty's Crim. Law, 1139: "In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character. But the object of conspiracy is not confined to an immediate wrong to particular individuals; it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any act in itself illegal."

Parsons, C. J., in Com. v. Judd, 2 Mass. 829, 3 Am. Dec. 54, said: "The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes; that the offense is complete when the confederacy is made; and any act done in pursuance of it is no constituent part of the offense,

§ 172. **Civil and criminal conspiracies.**—The distinction between civil and criminal conspiracies and the law governing the same will be fully discussed in a subsequent chapter. But in both civil and criminal conspiracies the combination is the gist of the offense.

§ 173. **Legal combinations.**—The law recognizes the economic truth that the co-operation of individuals is essential to the well being and the progress of society. It has been forcibly said: "Associations are so common an element, not only to commerce, but in all the affairs of life, that it would be rather perilous to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality. It made and conducts our government, constructs our railroads, our steam vessels, our magnificent ships, our temples of worship, structures for public and private use, our manufactories, creates our institutions for learning, builds up our cities and towns. Its very office is to do what individual exertion may not accomplish, and in a degree distinguishes civilized from savage life. Why, then, should this important agency be denied to this meritorious class of citizens? They are in general men of small means, to whom an association may not only be desirable, but necessary and indispensable."¹

§ 174. The law encourages and provides for the formation of —

1. Partnerships.
2. Corporations.

And the law permits and often directly authorizes the —

3. Consolidation of partnerships.
4. Consolidation of corporations.

§ 175. Every partnership and every corporation is a combination of individuals co-operating together towards a given end,

but merely an aggravation of it. This rule of the common law is to prevent unlawful combinations. A solitary offender may be easily detected and punished; but combinations against law are always dangerous to the public peace and to private security. To guard against the union

of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished to prevent the doing of any act in execution of it."

¹ Jones v. Fell, 5 Fla. 510; Andrews' American Law, pp. 562, 563.

and if organized for profit (as distinguished from benevolent and social organizations) the objects of partnerships, corporations and their consolidations are to accomplish collectively what the constituent members cannot so well accomplish separately, viz.:

(a) To use the strength of the combination to reduce cost of producing and marketing products.

(b) To use the strength of the combination to control prices.

(c) To use the strength of the combination against competitors by discouraging and, if possible, suppressing competition.

§ 176. These several objects may not be directly avowed in the articles of every copartnership and in the charter of every corporation, but a partnership or private corporation which has not for its object one or more of the objects enumerated above has no reason for existing, and should command neither confidence nor support in the commercial world. In the commercial world, partnerships and corporations are not organized for philanthropic, benevolent or social purposes — they are organized for profit; and they are organized because the constituent members believe that by co-operation they can make an increased profit: (a) by selling the same amount of goods at a greater margin between cost and selling price; or (b) by selling a greater amount of goods at the same margin of profit; or (c) both.

§ 177. The magnitude of the combination has a direct bearing upon the power but not upon the character of the combination. The legality of a combination is not determined by the extent of its power or influence. Its legality is determined by the purposes to which the combination proposes to devote its power and influence; and since neither the morality nor the legality of a purpose is measured by its magnitude, a small combination may be as illegal, though not as dangerous, as a large one.

§ 178. The law lends its sanction to an almost infinite variety of combinations and consolidations the objects of which are to control products, prices and competition.

§ 179. Two merchants or millers in a small village may combine in a partnership or a corporation, and the combination is legal, although they are the only competitors in the place, and the object of the combination is to suppress competition and

control the market. These small combinations are matters of daily occurrence; and where new partnerships or new corporations are not formed, the same object is attained quite as effectually by one concern buying out the other. In short, consolidations the sole object of which is often to get rid of competition with a view to advancing prices are a matter of course in the industrial and commercial world, are authorized by legislatures and approved by the courts.

§ 180. It would seem needless to say that what two or three may do on a small scale in a small place, four or more may do on a larger scale in larger places. The test is not and cannot be the number of parties entering into the combination — the partnership or corporation — nor the extent of the territory covered. The number may be all engaged in a given industry, and the territory controlled may be the entire country, and the combination still be not only legal, but practically and positively beneficial. While it may true that, as a rule, the chances that a combination is illegal and its means or purposes oppressive are in direct proportion to the percentage of the trade and the extent of the territory controlled, as a matter of fact neither the number involved nor the territory controlled is any evidence whatsoever of the illegality of the combination.

§ 181. A combination of two may be just as obnoxious to the law as a combination of all, and a combination of all in a given industry may be as legal as a combination of two. The test of validity is found in the objects and purposes of the combination, not in the number or strength of those co-operating.

CHAPTER 6.

LEGAL COMBINATIONS.

- § 182. Instances of legal combinations.
- 183. Conflicting decisions.
- 184, 185. Some general considerations.
- 186. Combination for immoral object.
- 187. Combination for unlawful object.
- 188. Combination for oppressive object.
- 189-209. General propositions applicable to commercial and industrial combinations.
- 210. Law of evolution in commercial and industrial world.
- 211. A general rule regarding injury to others resulting from a combination.
- 212, 213. Extent of injury to others not a test of legality of combination.
- 214. Conflicting statutory provisions.

§ 182. Instances of legal combinations.—Beginning with small partnerships and small private corporations for profit, it would not be difficult to recite an almost infinite number of legal combinations, in almost every sphere of industrial and commercial activity, proceeding on through the consolidations of partnerships and corporations until cases such as those about to be reviewed are reached and passed upon by the courts.

Before considering the various statutes and decisions which have been directed against combinations, and under which combinations have been held illegal, it is important to review in detail those cases wherein the courts have passed upon combinations, often of great magnitude, and have held such combinations legal.

§ 183. Conflicting decisions.—It may be said in advance that the decisions sustaining combinations and the decisions condemning combinations cannot be reconciled. The facts and conditions presented to the courts in the two classes of cases cannot be so differentiated as to warrant the diametrically opposite conclusions reached. The most that can be said is that the majority of the cases wherein combinations have been held legal do not present features which stamp the combinations as conspiracies; whereas many, and perhaps most, of the cases wherein

combinations have been held illegal do present features which mark the combinations as conspiracies. A combination which amounts to a conspiracy is of course illegal; but it would seem to be equally obvious that a combination which is organized for the purpose of doing, neither as a means nor an end, that which is unlawful, immoral or oppressive, is not a conspiracy and not illegal. It is difficult to understand why a combination, the means and ends of which are not unlawful, immoral nor oppressive, should be held illegal no matter what its magnitude may be — whether it be the combination of two millers in a village, or of all the millers in a state or in the country.

§ 184. **Some general considerations.**— As already stated, it will ever be borne in mind that, as the magnitude of the combination increases, the possibility increases, that in its means or ends the combination is organized for oppressive purposes; and it is undeniably true that the greater the magnitude of the combination the greater the suspicion with which it is regarded in the popular mind and by the courts, and the less the amount of proof required to convince the courts of the oppressive character of the combination. But despite the considerations last named, the illegal character of the combination is not to be established by proving its magnitude; there must be affirmative evidence tending to show that it was organized for the express purpose of doing, as a means or an end, that which is unlawful, or immoral or oppressive,—in other words, that the very purposes for which the combination was organized were contrary to private or public welfare.

§ 185. Before a combination can be pronounced illegal it must affirmatively appear that it was formed for the express purpose of doing, either as a means or as an end, that which is —

1. Immoral;
2. Unlawful; or
3. Oppressive.

§ 186. **Immoral object.**— It is comparatively seldom that courts are called upon to determine the legality or illegality of a combination formed for immoral purposes. It frequently happens that parties are indicted and prosecuted criminally for conspiracy, the object of which is of an immoral character. But in whatsoever shape the question may be presented it is

not one difficult of solution, for either court or jury, as the case may be, may readily ascertain from the evidence as a matter of fact whether or not the object of the combination or conspiracy is of an immoral character.

§ 187. **Unlawful object.**—Both civil and criminal courts are frequently called upon to pass upon combinations which amount to conspiracies, because their objects, either as means or ends, are of an unlawful character. Whenever such combinations are before the courts it is within the province of the jury or the court, as the case may be, to determine first, as a matter of fact, what are the means and ends contemplated by the combination; the means or ends being ascertained as matters of fact, it ought not to be difficult for the court to say, as matter of law, whether those means or ends are contrary to law — that is, contrary either to some statutory provision or to the common law. If, however, it is urged that while the means or ends contemplated by the combination may not be contrary to any statutory provision, or contrary to any definitely ascertained rule of the common law, yet they are opposed to public policy, the problem presented to the court for solution is much more difficult. But if the court endeavors dispassionately to ascertain definitely the rule of public policy as laid down and determined by decisions of the courts and acts of the legislature, it ought not to be difficult to test the legality of the objects of any given combination by the rule so ascertained. Trouble arises when the rule of public policy is permitted to vary from year to year with fleeting and changing public sentiment. If it be constantly borne in mind that nothing is contrary to public policy which is not inherently wrong, many difficulties will vanish. It will not do to say that something is contrary to public policy because wrong, and is wrong because contrary to public policy; that sort of reasoning is futile. The object of a combination may be opposed to public policy because wrong, and it is wrong because it contemplates fraud or oppression towards others. So that in determining whether or not the objects of a combination are unlawful, the objects must first be ascertained as a matter of fact; secondly, it must be determined as a matter of law whether those objects are opposed to the spirit or letter of any statutory provision, or to any well-settled rule of the common law, or contem-

plate such fraud or oppression towards others as render them contrary to some well-defined rule of public policy.

§ 188. **Oppressive object.**— Assuming that a court may, without serious trouble, ascertain whether the objects of a combination are immoral or unlawful, it is often a matter of great difficulty to decide whether or not the objects of a combination are of such an oppressive character as to render the combination illegal. If the combination on the very face of its organization amounts to a conspiracy to injure or ruin a third party, the courts do not hesitate to pronounce such combination illegal and even convict the conspirators. In reviewing the law of “corners,” combinations have been considered the very object of which was to profit by injuring or ruining others. While the prime object of a “corner” is to make money for those composing it, the means to attain that object is the aggressive oppression of others. When we come to review the cases of illegal combinations, it will be found that many of them amount to conspiracies the very object of which is to profit by oppressing and injuring others. Where such objects are affirmatively proven and clearly apparent, there can be no question that the combinations are illegal as amounting to conspiracies. But it is obvious that as between a combination the very object of which is to oppress and ruin others, and a combination the object of which is simply to gain advantages for the parties thereto without oppressing and injuring others, any more than is incidental to large commercial operations, the variations are numerous and the gradations imperceptible. The disinterested judge who resolutely closes his ears to popular clamor indiscriminately denouncing all combinations, and endeavors honestly to ascertain whether or not the objects of a given combination are oppressive, may find the question — like most close questions of fact — troublesome. For the question whether or not a given object of a particular combination is or is not oppressive is a question of fact to be determined entirely from the evidence. In determining this question of fact it must first be ascertained what the object is, for a combination cannot be pronounced illegal unless its object is clearly and definitely ascertained. Secondly, after ascertaining what the object is, what the combination intends to do, what it was organized for the purpose of doing, it is then necessary to as-

certain, as a matter of fact, from the evidence, who the parties are that the combination intends to defraud, oppress or injure. Unless the parties to be injured can be ascertained quite definitely, it would seem manifestly unjust to pronounce the combination illegal. Nor will it do to say broadly and vaguely that the objects of the combination are inimical to the best interests of the public at large. Society is seldom injured except through some of its members. In all commercial and industrial transactions it is not conceivable that the public generally should be injured, if no injury of any character can be traced directly to any individual or body of individuals. Therefore, before the objects of the combination can be pronounced contrary to public policy because oppressive, the individual or body of individuals directly injured thereby must be ascertained and designated. When the objects of a combination are definitely ascertained as a matter of fact, and the individuals who are directly affected thereby are also ascertained as a matter of fact, the further question remains whether the injury to the individuals immediately affected is of such a character as to render the object of the combination contrary to public policy; and in this connection the following general propositions applicable to industrial and commercial transactions have been laid down:

§ 189. **General propositions applicable to commercial and industrial combinations.**—(A) The object of every man engaged in trade is to advance his own interests as against the interests of all competitors. All trade is, and must be, in a very profound sense, selfish; the amount of any particular trade being limited, what one man gains another often loses.¹

§ 190. (B) Competition exists when two or more persons seek to possess or enjoy the same thing; the success of one must necessarily mean the failure of the other, and there is no principle of law which enables courts to interfere with or moderate either the success or the failure so long as it is due to mere competition — fraud, intimidation or oppression not being involved.²

§ 191. (C) Parties engaged in trade have the right to push their trade by all lawful means, and to endeavor by all lawful

¹ See §§ 257, 262, *infra*.

R. 23 Q. B. D. 624-632. See § 262,

² *Mogul S. S. Co. v. McGregor*, L. *infra*.

means to keep their trade in their own hands and exclude others from participating therein. It is lawful to make profitable offers to attract customers from competitors, and they may induce customers to deal with them exclusively by giving notice that to such exclusive customers only will they give the benefit of their more favorable terms.¹

§ 192. (D) Inasmuch as it is legal for one man by competition to strive to drive his rival out of the field, it is lawful for two or more to combine to the same end, providing the means to be used are only such as the individual could use, namely, lawful means.²

§ 193. (E) It is quite legitimate for any trader to obtain the highest prices he can for any commodity in which he deals.³

§ 194. (F) Parties are to be given the widest latitude to make contracts with reference to their private interests, and the court is not at liberty to indulge in inferences which would restrict parties in the right to combine their interests.⁴

§ 195. (G) It is legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods and a division of their profits.⁵

§ 196. (H) Any person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors.⁶

§ 197. (I) Combinations which have for their object the realization of a fair price for the product manufactured and sold are not against public policy, even though in some respects they operate in restraint of trade.⁷

¹ *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. D. 552. See §§ 262, 266, *infra*. et al. (1899), 43 Atl. R. 723. See §§ 231, 232, 262, *infra*.

² *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. D. 624-632. See §§ 262, 266, *infra*. ⁷ *Cohen v. Berlin & Jones Envelope Co. et al.* (1899), 56 N. Y. Supp. 588; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. R. 785; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. R. 363; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. R. 419; *Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. R. 403; *Drake v. Siebold*, 81 Hun, 178, 30 N. Y. Supp. 697; *Matthews v. Associated Press*, 61 Hun, 199, 15 N. Y. Supp. 887. See §§ 223, 224.

³ *Dolph v. Troy Laundry Machinery Co.* (1886), 28 Fed. R. 553. See § 228, *infra*.

⁴ *Herriman et al. v. Menzies et al.* (1896), 115 Cal. 16, 35 L. R. A. 318. See § 238, *infra*.

⁵ *Dolph v. Troy Laundry Machinery Co.* (1886), 28 Fed. R. 553. See § 228, *infra*.

⁶ *Trenton Potteries Co. v. Olyphant*

§ 198. (J) A combination to regulate competition between the parties thereto is not illegal.¹

§ 199. (K) Even though a combination tends to raise the price of a commodity, still it is not illegal, for to hold otherwise would be to impair the right of persons to make contracts, and to put a price upon the products of their own industry.²

§ 200. (L) It is not contrary to public policy "that two rival traders agree to consolidate their concerns, and that one shall discontinue business and become a partner with the other for a specified term," even though as the result of such an arrangement the public have to pay more for the commodities in which the parties deal.³

§ 201. (M) Competition may be at once affected and ultimately suppressed by a party purchasing one after another the plants, business and good will of competitors; and in the absence of legislative restrictions—even if such could be imposed—upon the acquisition of such properties, courts can impose no limitation upon the freedom to make such purchases, but on the contrary are obliged to enforce such contracts notwithstanding their effect is to diminish or even to exclude competition.⁴

§ 202. (N) In these respects a corporation, unless restricted by the laws of the state under which it is organized, may exercise the powers of an individual and may purchase the plants and business of competitors, even though such purchases may diminish or for a time destroy competition.⁵

§ 203. (O) Two or more men may lawfully form a copartnership to buy and sell produce and merchandise in any village or place; the law does not require that they should compete in the purchasing and selling produce and merchandise; individually each party has the right to buy produce as low as he can and sell it as high as he can; and collectively they have the same right, unless deception or fraud is practiced on the public.⁶

§ 204. (P) There is no violation of law or of public policy in an agreement between two traders that one should sell to

¹ Central Shade Roller Co. v. Cushman (1887), 143 Mass. 353, 9 N. E. R. 629. See § 225, *infra*.

² Central Shade Roller Co. v. Cushman, *supra*. See § 225, *infra*.

³ Dolph v. Troy Laundry Machinery Co. (1886), 28 Fed. R. 553. See § 228, *infra*.

⁴ Trenton Potteries Co. v. Olyphant et al. (1899), 43 Atl. R. 723. See §§ 231, 232, *infra*.

⁵ Trenton Potteries Co. v. Olyphant et al., *supra*. See §§ 231, 232, *infra*.

⁶ Fairbank et al. v. Leary (1876), 40 Wis. 637.

the other all its commodities and the other buy from the former corporation alone.¹

§ 205. (Q) Where an individual or corporation is threatened with competition it is neither illegal nor immoral to persuade the competitor to abandon the enterprise; and it is entirely legitimate to enter into an agreement to take the competitor into employment.²

§ 206. (R) An agreement the object of which is to remove a business rival whose competition is considered dangerous is not illegal where there is no attempt to exclude all competition in the business.³

§ 207. (S) It is legitimate to combine capital for all purposes of trade for which capital may, apart from combination, be legitimately used in trade.⁴

§ 208. (T) The stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus, necessarily, to interfere with what would have been the course of trade if unaffected by such combinations.⁵

§ 209. Each of the foregoing general propositions is supported not only by authority, but by common sense, and they embody the principles which control all the smaller transactions of the commercial and industrial world. It is only when some very large combination is before the court and public interest is excited that the validity of these general propositions is questioned.

§ 210. **Law of evolution in commercial and industrial world.**—It is apparent from a consideration of these general propositions that the law of evolution obtains in the commercial world as elsewhere—that the struggle is for the survival of the fittest, and it may be assumed that in the long run society and mankind will be benefited by permitting this law to work out its inevitable results, even though its operation is attended by inconvenience and even hardship to the weaker.

¹Chitty on Contracts (11th Am. ed.), N. E. R. 363, 110 N. Y. 519. See § 248, 982, 983 and notes. *infra*.

²Oakes v. C. W. Co. (1894), 143 N. Y. 430, 38 N. E. R. 461. See § 262, *infra*. ⁴Mogul S. S. Co. v. McGregor et al., L. R. 21 Q. B. D. 553. See § 262, *infra*.

³Leslie v. Lorillard et al. (1888), 18 L. R. 23 Q. B. D. 624-632. See § 262, *infra*. ⁵Mogul S. S. Co. v. McGregor et al.,

§ 211. A general rule.—It is clearly apparent that it is not every injury or oppression towards others that renders the object of any combination, whether a partnership or a corporation, illegal. In so far as any general rule can be laid down, it may be stated as follows: If injury or oppression towards others be the prime object of the combination, then such object is illegal and stamps the combination as a conspiracy; if, however, the injury or oppression towards others be simply incidental to the object of the combination, then such object is not illegal, and the combination is not a conspiracy. And this general proposition will, as a rule, hold good, though it should appear as a matter of fact that the indirect injury and loss to others resulting from the operation of some particular legal combination is far greater than the direct injury resulting from the operation of some smaller illegal combination.

§ 212. Extent of injury to others not a test of legality of a combination.—It is apparent that neither the extent nor the character of the injury to others resulting from the operation of a given combination is a test of the legality of the combination. Conditions are constantly changing in the commercial and industrial world. Under normal conditions traders and manufacturers are involved in loss and financial ruin as the result of forces over which they have no control. The establishment of department stores, for instance, in large cities has altered the entire complexion of retail trade; and small shopkeepers heretofore prosperous find themselves unable to compete with these huge establishments. Among retail dealers, and owners of real estate in cities whereon are situated small shops and stores, the prejudice against department stores fully equals any public prejudice against trusts and combinations; and attempts are frequently made to pass laws the object of which is to disintegrate the department store—to break up the combination of businesses which go on under one large roof. So far these attempts have proved abortive, few legislatures being willing to risk the passage of acts which on their face are as idle and foolish as would be the passage of a law against the employment of labor-saving machinery; and so far no court has been found willing to sustain any act looking towards the disintegration of the department store. The department store is simply a striking illustration of the tendency

of the day towards concentration and combination. What is going on in the world of retail trade is going on in the world of manufacture and commerce and all branches of industry. It is needless to say that co-operation, organization and combination in all forms affect more or less parties who are outside of the combination; and exactly in proportion as the combination is profitable to all interested in it and economically beneficial to the public at large, to that extent it is more or less disastrous to all who are in competition with it. The extent of the injury or loss to the outsiders is no measure of the legality of the combination. If the combination is improvidently conducted, those outside of it may actually benefit thereby. On the other hand, if the combination is wisely conducted, those outside of it may find themselves deprived of trade and means of support within a month or six months, as the case may be. These effects incidental to the proper conduct of any sort of combination — whether a partnership, a corporation or a consolidation — are of interest to the student of economics, but are entirely irrelevant so far as courts or juries are concerned, except in so far as they may tend to show affirmatively that the original intent of the combination was of an unlawful or oppressive character.

§ 213. Irrespective of the practical results of the operation of a combination, the question of its legality or illegality turns entirely upon its original purposes and objects. If such objects and purposes — either as means or ends — are to profit by the direct oppression of third parties, then the combination is illegal; if, however, such objects and purposes are simply to accomplish in larger form what individuals might legally accomplish in lesser degree, without intending to oppress or injure others to any greater extent than is normally incidental to the prosecution of an object in itself legitimate, then such combination is legal.

§ 214. **Conflicting statutory provisions.**—In laying down these general propositions the statutes of the several states and of the United States specifically directed against combinations are not taken into consideration, for many of these statutes in their liberal terms are so broad and sweeping that they condemn entirely all combinations, whether good or bad, reasonable or unreasonable. These statutes will receive due con-

sideration in a chapter by themselves. Neither courts nor text-writers possess sufficient ingenuity to reconcile the legislative enactments of the various states of this country, whether these enactments apply to combinations or to other matters; and no matter what the subject under consideration — divorce, corporations or combinations,— the most that court or text-writer can do is to ascertain if possible the general principles governing the law of the subject, and then state separately the various statutory provisions bearing thereon. Seldom, indeed, is it that statutory provisions have any logical connection with, or harmonious relation to, the general principles.

§ 215. With these general remarks we will proceed to the consideration of the cases wherein courts have sustained combinations, and in order that the bearing of the cases may be appreciated it is necessary to state each somewhat in detail.

CHAPTER 7.

CASES SUSTAINING COMBINATIONS.

- § 216. Cases of legal combinations.
- 217. Combination of zinc companies.
- 218-221. Combination of oleomargarine producers.
- 222. Combination of glue makers.
- 223, 224. Combination of makers of envelopes.
- 225, 226. Combination of manufacturers of curtain fixtures.
- 227. Combination of stone quarries.
- 228. Combination of manufacturers of laundry machinery.
- 229, 230. Combination of manufactures of woodenware.
- 231, 232. Combination of pottery makers.
- 233. Combination among buyers of produce.
- 234. Combination between buyers and sellers of sheep and lambs.
- 235, 236. Combination of mill-owners and warehousemen.
- 237, 238. Combination of stevedores.
- 239. Combination of owners of amusement resorts.
- 240-243. Combination of gas companies.
- 244. Combination between parties competing for public franchise.
- 245. Combination between publishers — Associated Press.
- 246. Combination of salt producers in Canada.
- 247, 248. Combination between owners of steamboats.
- 249-266. Combination between steamship owners — Mogul Steamship Co. case, England.

§ 216. Cases of legal combinations.— The leading cases in which combinations have been sustained are here gathered together. The facts in each case are recited somewhat at length so that both the limitations and the scope of the decision may be fully appreciated. The effort has been made to state in the text the general propositions laid down in each decision, and to give in the note sufficient of the opinion to enable the reader to make intelligent use of the authority without necessarily turning to the original report. It would be misleading to attempt to cover these cases with a few general propositions, since the decision in each case depends entirely upon the peculiar facts presented for the consideration of the court.

§ 217. Combination of zinc companies.— Competing zinc companies had become interested in the same mineral deposits.

and in developing the veins became involved in controversies and litigation. To adjust their differences, settle the litigation and suppress their competition the rival interests were consolidated, and in the consolidation other mines and plants in different parts of the state and country were purchased. The combination was sustained as legal upon the following grounds:

1. That zinc was not a necessity of life.
2. That the combination controlled but a small fraction of the world's supply.
3. That the combination did not tend to create a monopoly.
4. That the law forbidding forestalling the market does not apply to the purchase of zinc properties.
5. That the buying by one corporation of the property and assets of another and consolidating the whole into one business, as was done in this case, is not contrary to public policy.
6. That there is no foundation either in law or morals for the proposition that the public have the right to have private owners of property — such as zinc properties — continue to do business in competition with each other.
7. That the essential quality of competition is that it shall be the result of free choice of the individual and not of any legal or moral obligation or duty.¹

¹ *Meredith et al. v. Zinc & Iron Co.* (1897), 55 N. J. Eq. 212, 37 Atl. R. 539.

In its opinion the court said:

"It remains to consider the question of illegal combination which would subject the new corporation to an attack by the attorney-general. Upon such consideration as the four days allowed me for that purpose have permitted me to give the subject, I think that there is nothing in that ground.

"The circumstances show that it is not the object or purpose of the contract to create a monopoly. The affidavit of the president of the New Jersey Zinc and Iron Company shows that the zinc ores which will be controlled by it after these several purchases constitute but a small fraction of the world's supply, and that its product of zinc will also be but a small

fraction of that purchased throughout the country. Besides, buying up by one corporation of the property of another, and consolidating the whole into one business to the extent and in the manner provided for in this agreement, is not, in my judgment, contrary to public policy, nor does it tend to create a monopoly. The question was carefully examined by Vice-Chancellor Green, in *Ellerman v. Stock Yards*, 4 Dick. Ch. R. 217, and that opinion was reviewed and reaffirmed in the subsequent case of *Willoughby v. Junction Railways*, 5 Dick. Ch. R. 656, heard by both Vice-Chancellor Green and Vice-Chancellor Van Fleet, and they concurred in the same result.

"It must be remembered in this connection that these companies are not exercising any public franchise

§ 218. Combination of oleomargarine producers.— In 1891 a number of competing concerns, engaged in the manufacture of oleomargarine, entered into a preliminary agreement for the formation of a combination by organizing a corporation under the laws of the state of Kentucky which would take over their respective plants, assets and good will. In this preliminary agreement each covenanted not to engage directly or indirectly in any business of the same character for a period of five years. Pursuant to the agreement a corporation was duly organized, and the plants, assets and good will of the various parties transferred thereto, each party taking in payment therefor stock in the new corporation. One of the parties sold out his stock at a price in excess of its value, and immediately engaged in the oleomargarine business in competition with the new corporation. On a bill for an injunction to restrain the violation of the preliminary agreement it was urged:

That the agreement was void as a combination to raise the price of a necessary and useful commodity in trade, and to stifle competition.

of being a corporation. Their business is one that may be conducted by private individuals. They are simply the owners of a certain species of property which, in its natural state, is of no use to mankind, and which, after it has been manufactured and made fit for use, can hardly be classed as a necessity. The law forbidding forestalling the market does not, in my judgment, apply to the purchase of such property. By the law of the land these owners have the right to exercise their own judgment as to when, if ever, and how they will spend their money in preparing their property for market and rendering it fit for use by mankind. Now, I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that

its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of the free choice of the individual and not of any legal or moral obligation or duty.

“But I am satisfied that it is not the object of the consolidation to smother competition, and that the real object is to put an end, honorable and profitable to both parties, to a litigation whose issue is really incapable of satisfactory judicial determination.”

That one of the purposes of the agreement was to form a corporation under the laws of Kentucky in violation of the laws of Rhode Island.

That the agreement being in restraint of trade it is illegal and its enforcement would be unreasonable.¹

In passing upon these various objections the court said: "Undoubtedly there may be combinations so destructive of the right of the people to buy and to sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for a mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule."

§ 219. Where three or four companies engaged in the manufacture of oleomargarine in New England agree to unite, but the field is left open not only to the remaining outside company, but also to competition from companies in other parts of the country, and to the formation of new companies, the agreement amounts to neither a monopoly nor such an approach to monopoly as to be illegal, although the principal object of the agreement is to stop the sharp competition existing between the three companies. And such a combination is one of common occurrence, and is not illegal on the ground of reducing competition.²

¹ Oakdale Mfg. Co. et al. v. Garst (1894), 18 R. L. 484, 28 Atl. R. 973.

² Oakdale Manuf. Co. et al. v. Garst, *supra*.

§ 220. It is not a violation of the laws of public policy of the state of Rhode Island for citizens of that state to incorporate under the laws of another state for the purpose of carrying on business in Rhode Island, providing the corporation pursues a lawful business and violates neither law nor public policy of the state; although the fact that citizens of one state incorporate under the looser or more liberal laws of another state may excite curiosity, if not suspicion, as to the motives and good faith of the corporation.¹

§ 221. As regards the reasonableness of the five-year period of restraint, the agreement is to be construed in the light of the circumstances and conditions under which it was made, and where it appears that the contracting parties were all capable business men knowing well what they were about, and that the restrictive clause was mutually beneficial, and that each party was to gain the same advantage from it as the others, and that considering the nature and extent of the business and the limited period of time, the restriction was not oppressive, a party who has derived his advantage from the agreement as a whole, including the restrictive clause, and has sold out the stock he received at a value materially higher by

¹ Oakdale Manuf. Co. et al. v. Garst, *supra*. "With reference to the third ground of defense it does not appear that the agreement in any way violates the laws or policy of this state, and if it did, the defendant, being a party to it, could not set it up. Chafee v. Sprague Manuf. Co., 14 R. L. 168. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of this case, for foreign corporations have frequently been recognized as suitors in this court. Windham County Bank v. Kendall, 7 R. L. 77; Howe Machine Co. v. York, 11 R. L. 388; Boston & Colorado Smelting Co. v. Smith, 13 R. L. 27; Singer Manuf. Co. v. King, 14 R. L. 511. They are also recognized as doing business here by comity. Peirce v. Crompton, 13 R. L. 312. While the fact that citi-

zens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders given to creditors under our statutes are wanting; but that is a matter for those who deal with the corporation to consider. We can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes (Pub. Laws, cap. 1200) expressly provide for corporations formed in this state for carrying on business out of the state."

reason of the restrictive clause in the agreement, will not be permitted to repudiate the restriction and resume business in competition with the combination.¹

¹ *Oakdale Mfg. Co. et al. v. Garst, supra.* "The fourth ground of defense involves the reasonableness of the restrictive covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time and space. There has been much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu*, with social progress to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of universality of time (*French v. Parker*, 16 R. I. 219), nor of space (*Herreshoff v. Boutineau*, 17 R. I. 3); but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really turn upon the reasonableness of the restriction. For example, in *Wiley v. Baumgardner*, 97 Ind. 66, cited by the respondent, sale was made of a dry-goods store, with the vendor's agreement not to engage in the dry-goods business for five years, and in *Herreshoff v. Boutineau* the agreement was not to teach within this state. In these cases the subjects of the contracts were of a purely local character and outside restraint was unreasonable. On the other hand, in *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, where the business was extensive, restraint within the entire territory of the United States, and in *Tode v. Gross*, 127 N. Y. 480, unlim-

ited restraint as to territory, were sustained. The contract is to be determined by its subject-matter and the conditions under which it was made; by considerations of extensiveness or localism, of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this it did; for when he sold his stock he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitations of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done and where, and so the term of five years was agreed upon, within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable. We think the

§ 222. Combination of glue makers.—An agreement between manufacturers of glue for the double purpose of compromising certain litigation respecting the infringement of a patent, and also for the purpose of suppressing competition and regulating prices, is not illegal; the court holding that the product is neither a prime necessity of life nor a staple commodity. The agreement will be enforced notwithstanding that the patent is subsequently found to be invalid, and the agreement is renewed for the sole purpose of suppressing competition and controlling prices.¹

§ 223. Combination of makers of envelopes.—The business of the manufacture of envelopes being demoralized through excessive competition, certain manufacturers entered into an agreement with one of their competitors, by which the former agreed to purchase from the latter, at prices to be fixed from time to time by the former, a stated quantity of envelopes per day, amounting to the full capacity of the factory of the latter; and the latter agreed that during the continuance of the agreement he would not sell envelopes to other parties at a lower price. It is apparent that the very object of this agreement was to fix the price of envelopes by removing competition. It appeared as a matter of fact that nineteen other envelope companies scattered throughout the country were not parties to the agreement and remained in competition with the combination.

It was urged that the contract was not enforceable, as it was entered into for the purpose of stifling competition, enhancing prices and restraining production.²

complainants are entitled to the relief prayed for."

So in *Tode v. Gross*, 127 N. Y. 480, 28 N. E. R. 469, the defendants had sold their business of making cheese by secret process under a general restriction not to engage in the business for five years, with reference to which it is said: "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price and the other to get what they paid for. It imposed no restriction on

either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. The restriction under consideration, however, was not unlimited as to time."

¹ *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* (1891), 154 Mass. 92, 27 N. E. R. 1005.

² *Cohen v. Berlin & Jones Envelope Co. et al.* (1899), 56 N. Y. Supp. 588.

On this contention the court held broadly that —

1. The rule of law established is, that where the agreement deals with an article of prime necessity, and by its terms seeks to prevent competition in trade therein and to control the market price of said article, it is contrary to public policy and void.

2. The test of such an agreement is not what has been, but what may be, done thereunder, and if it may operate to the prejudice of trade and to the injury of the public it is void.

But all agreements in restraint of trade are not void.

§ 224. Agreements which have for their object the realization of a fair price for the product manufactured and sold are not against public policy, even though in some respects they operate in restraint of trade.¹

¹ See *People v. Sheldon*, 139 N. Y. 251, 34 N. E. R. 785; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. R. 363; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. R. 419; *Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. R. 403; *Drake v. Siebold*, 81 Hun, 178, 30 N. Y. S. 697; *Matthews v. A. P. S.* N. Y., 61 Hun, 199, 15 N. Y. S. 887.

Referring to the peculiar facts in *Cohen v. Berlin & Jones Envelope Co.* (1899), 56 N. Y. S. 588, the court said:

"It is insisted that the clause of the contract whereby the plaintiff was to furnish two hundred and fifty thousand envelopes daily was not a sale, and was not intended to be, and, as the proof shows that no envelopes were delivered under it, it is conclusive of such fact. It is apparent that the number contracted to be sold was the full capacity of the manufactory. The plaintiff had never been able to sell this number of envelopes; so the contract did not operate in restraint of production. The plaintiff bound himself absolutely to deliver upon demand these envelopes in this volume, and it cannot be said that because they were not demanded the obligation of the contract was less, or,

because they were not so demanded, that the public could suffer thereby. The plaintiff was not bound to manufacture under the contract to the whole extent of his capacity unless required; and it does not appear that the trade, either before or subsequent to the execution of the contract, demanded this quantity of envelopes, either at the scheduled price, or any price at which they had previously sold. If the arrangement were carried out it might well have been expected that the whole number would have been required; and, if this condition existed, then plaintiff was bound to furnish, and not only to furnish but to pay at the rate of ten cents a thousand if he increased the production. Quite likely it is that the plaintiff, if he were able to dispose of this number of envelopes, would be willing to make this payment in return for the volume of business which he was able to do if he could thereby manufacture and sell more; but nothing done under it, whether the demand was made or not, in any wise injuriously affected the public or could so affect it, unless thereby the price was enhanced. But to a limited extent, and for the purpose of obtaining a reasonable

§ 225. Combination of manufacturers of curtain fixtures. Three manufacturers of patented curtain fixtures under patents owned by them severally formed a combination the object of which was to avoid competition. A corporation was organ-

profit, this was legitimate. The evidence does not show that the prices were raised beyond this point. Indeed, in some respects the price was reduced below what it was before the contract was made. Although the plaintiff was bound to sell at schedule prices, yet it is not made to appear that any schedule of price could be fixed at which the goods could be disposed of, and produce more than a reasonable profit, under the circumstances surrounding the execution of this contract, or during the time of its operation; and, if this be so, we see no reason why a jury might not find that it was not intended to unduly raise prices. When the plaintiff was first approached upon the subject of a combination the proposition was to buy his business. It cannot be doubted but that the defendant had the right to buy out all the envelope manufacturing business and consolidate the same, even though they thereby obtained power to end competition and arbitrarily fix prices. Because some of these results flow from a combination where the parties remain the owners of the business, it does not necessarily follow that the combination is unlawful. It was held in *Oakes v. Water Co.*, 143 N. Y. 430, 88 N. E. R. 461, that it was not unlawful, where competition was threatened, to contract with the competitor to abandon his enterprise and enter into employ with the established business. Upon principle, there can be no distinction between such a contract and a combination of the same persons to run the business upon a standard agreed upon between them; and not only under this authority, but under those already

cited, such agreement will be sustained, within the limitations already suggested."

In this case it appeared that the envelope trade had become thoroughly demoralized by competition.

"It appeared upon the trial (at least for all purposes essential to support the verdict of the jury) that the business in which the plaintiff was engaged had fallen to a low ebb. To use the language of one of the witnesses for the defendants: 'The competition in the wholesale trade was very close and severe. Goods were being sold in New York by eastern manufacturers less than could be produced by New York manufacturers. Goods were sold in Philadelphia and in other places less than they could be produced and make a profit by the local manufacturers.'

"And he further stated that the trade was in such a demoralized condition that it was a question of bankruptcy or combination with many of them; that the goods were selling below what it cost to produce them, and that the formation of the Standard Envelope Company was necessary as a measure of protection against ruinous competition; that the purpose of the agreement was to give the people engaged in the business a living profit, and was not to strangle competition, or enhance prices beyond a point where a fair manufacturer's profit could be obtained; that at this time there were plenty of people engaged in this business who were not related to the Standard Envelope Company, either by contract or otherwise, but were in competition with it, and could keep the price within the range of

ized in which the three parties were the only stockholders; to this corporation they granted the sole right to sell the curtain fixtures for a period of three years. The corporation agreed to buy at a specified price all fixtures that the manufacturers might make, the manufacturers to act as the sole agents of the corporation and receive a commission on fixtures sold by them. It was further provided that during the period of three years the parties thereto should not dispose of their patents except upon condition that the party purchasing the patent should be bound by the agreement. It was also provided that stock in the corporation should not be sold without the written assent of a majority of the stockholders. One of the manufacturers began selling fixtures on his own account in violation of the agreement, and an injunction was sought to restrain him.¹ In sustaining the contract the court held broadly:

1. The purpose of the combination to prevent, or rather to regulate, competition between the parties thereto in the sale of the commodity which they made, is a lawful purpose.

2. The fact that the combination is effected by the formation of a corporation of which the parties to the combination are the sole stockholders is immaterial.

3. The contract in question put no restraint upon the production of the commodity to which it related, therefore is not void as being in restraint of trade.

4. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price upon the products of their own industry.

fair dealing. In this connection it appeared that there were nineteen other concerns doing business in various parts of the country that were more or less in competition with the parties to this contract. It is true that some of the witnesses for the defendants stated that the contracting parties did not regard these people as competitors, but it is equally true that the character of the business carried on by them showed that they were all more or less competitors, and some of them were shown

to be substantial. There was substantive testimony, therefore, to show that the purpose of the contract was not to stifle competition or to unduly increase prices, and the conditions were such that the operation of the contract could not produce, in an appreciable degree, injury to the public. At least, the jury were authorized so to find."

¹ Central Shade Roller Co. v. Cushman (1887), 143 Mass. 853, 9 N. E. R. 620.

5. The court cannot assume that the purpose and effect of such a combination are to unduly raise the price of the commodity.¹

§ 226. The case holds broadly that it is entirely lawful for competing parties to combine for the general purpose of regu-

¹In the opinion of the court Allen J., said:

"The contract which is sought to be enforced by this bill, and the validity of which is the only question presented by the demurrer and argued by the parties, was made between the plaintiff, of the first part, and three manufacturers, under several patents of certain curtain fixtures, known as 'wood balance shade rollers,' of the second part, in pursuance of an arrangement between the persons forming the party of the second part that the plaintiff corporation should be created for the purpose of becoming a party to the contract with them. The general purpose of the combination was to prevent, or rather to regulate, competition between the parties to it in the sale of the particular commodity which they made.

"This is a lawful purpose; but it is argued that the means employed to carry it out, the creation of the plaintiff corporation, and the terms of the contract with it, are against public policy, and are invalid.

"The fact that the parties to the combination formed themselves into a corporation, of which they were the stockholders, that they might contract with it instead of with each other, and carry out their scheme through its agency, instead of that of a pre-existing person, is obviously immaterial; and the only ground upon which it can be argued that the contract is invalid is the restraint it puts upon the parties to it. Does the contract impose a restraint as to the manufacture or the sale of balance shade rollers which is void as

against public policy? The contract certainly puts no restraint upon the production of the commodity to which it relates. It puts no obligation upon, and offers no inducement to, any person to produce less than to the full extent of his capacity. On the contrary, its apparent purpose is, by making prices more uniform and regular, to stimulate and increase production.

"The contract does not restrict the sale of the commodity. It does not look toward withholding a supply from the market in order to enhance the price, as in *Craft v. McConoughy*, 79 Ill. 346, and other cases cited by the defendant. On the contrary, the contract intends that the parties shall make sales, and gives them full power to do so, the only restriction being that sales not at retail or for export shall be in the name of the plaintiff, and reported to it, and the accounts of them kept by it; and the provision that when any party shall establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place. To these restrictions, clearly valid, is added the one which affords an argument for the invalidity of the contract — the restriction as to price. That restriction is, in substance, that the prices for rollers of the same grade made by the different parties shall be the same, and shall be according to a schedule contained in the contract, subject to changes which may be made by the plaintiff upon recommendation of three-fourths of its stockholders. In effect,

lating competition and establishing reasonable prices, and the objects of the combination may be attained by the organization of a corporation to control the trade. The court says: "When it appears that the combination is used to the public detriment, a different question will be presented from that now before us." Something other than the mere fact of the combination must be shown. It must appear that the purpose and objects of the combination were illegal or oppressive — in short, that the combination was a conspiracy; and the court will indulge in no presumption against it.

§ 227. Combination of stone quarries.—Twenty-four owners and operators of stone quarries in St. Louis entered into an agreement in which they set forth that the great competition then existing had so depressed the prices of building stone in the city as to make it impossible to operate quarries at a profit in certain parts of the city, and that it was desirable to formulate some plan which would secure fair prices and better conditions in the trade. To this end it was agreed: "1. That none of the subscribers will, for a period of six months from date, sell any rubble building stone, the produce of any quarry in

it is an agreement between three makers of a commodity that, for three years, they will sell it at a uniform price fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to an article of prime necessity; nor to a staple of commerce; nor to merchandise to be bought and sold in the market; but to a particular curtain fixture of the parties' own manufacture. It does not look to affecting competition from outside — the parties have a monopoly by their patents — but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry.

"But we cannot assume that the

purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects both to producers and customers of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid as in restraint of trade or against public policy.

"We have not overlooked other provisions of the contract which were adverted to in the argument, but we do not find anything which renders it invalid, or calls for special consideration."

St. Louis, south of the line named above, except as set forth in the agreement. 2. An exclusive agent is appointed for the period named to sell on account of the contracting parties all the rubble building stone of said quarries, giving to each quarry its proportionate share, taking into consideration its location and producing capacity; and the agent is instructed, until otherwise directed by the committee afterwards named, to sell the rock at prices set out in the instrument for various qualities of stone. 3. An executive supervisory committee of five is appointed to see that the agent deals fairly with each quarry, to modify the scale of prices and to hear and settle complaints. 4. The sum of \$100 is fixed as liquidated damages for each violation of the agreement; and each sale of one hundred perches, or less, of rock is to be held as a separate offense."

One of the parties was appointed trustee to enforce the agreement; this trustee brought suit for a hundred dollars damages against a party to the agreement for violating certain of its provisions. There was judgment for the plaintiff.¹

¹ In sustaining this judgment the court held (*Skrainka v. Scharringhausen* (1880), 8 Mo. App. 522) that "the old doctrine of the common law that contracts in restraint of trade are void is no longer to be rigorously insisted upon precisely as it was insisted upon in the earlier cases in which it was announced. It has been modified by the more recent decisions, as the laws of trade have become better understood during the development of our commercial system. (*Presbury v. Fisher*, 18 Mo. 50; *Long v. Towl*, 42 Mo. 545.)" The court continued: "It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade. When the avenues to trade and employment were impeded by artificial barriers, so that if one engaged not to practice his craft no other occupation was free to him, and he was likely to remain an idle and useless and to become a

dangerous member of society, the courts looked with grave displeasure upon any agreement by which one bound himself not to exercise his trade or mystery (to use the old phrase); but with greater freedom there came an opinion that such contracts were not necessarily in restraint of trade or an injury to the public. . . . The partial nature of the restraint in the case before us seems to be not colorable, but real. The agreement is amongst the quarymen of one district of one city, and it does not appear that it embraces all of them. There is no evidence that it works any public mischief, and the contract is not of such a nature that it is apparent from its terms that it tends to deprive men of employment, unduly raise prices, cause a monopoly, or put an end to competition. It is limited both as to time and place; and we know of no case in recent times in which a contract such as the one before us has been declared illegal."

The agreement was sustained as being a contract in only partial restraint of trade.

§ 228. Combination of manufacturers of laundry machinery.—Two competing manufacturers of laundry machinery agreed upon a scale of selling prices; one of them discontinued his business and became a partner with the other for a specified term. This agreement was sustained upon the following grounds:

1. Laundry machinery, although articles of convenience, are not articles of necessity.

2. The agreement did not contemplate suppressing the manufacture or sale of machines. Parties desiring machines could still find mechanics to manufacture them.

3. "It is quite legitimate for any trader to obtain the highest price he can for any commodity in which he deals."

4. "It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods, and a division of their profits."

5. It is not contrary to public policy "that two rival traders agree to consolidate their concerns, and that one shall discontinue business and become a partner with the other for a specified term," even though, as the result of such an arrangement, the public have to pay more for the commodities in which the parties deal.

6. The public have no right to complain so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly.¹

§ 229. Combination of manufacturers of woodenware.—An independent manufacturer who contracts to sell his entire product without any knowledge of similar contracts made by the purchaser so as to control the trade, and without any notice of the fact that the contract was any part of a scheme to control the trade, can enforce his contract.²

§ 230. A contract for the entire product of an independent manufacturer is not, in and of itself, void as in restraint of trade. Such a contract, while it will, of course, restrain the manufact-

¹ *Dolph v. Troy Laundry Machinery Co.* (1886), 28 Fed. R. 553. See *Perkins v. Lyman*, 9 Mass. 522; also *Jones v. Lees*, 1 Hurl. & N. 189; *Ainsworth v. Bentley*, 14 Wkly. Rep. 630; *Marsh v. Russell*, 66 N. Y. 288; ² *Carter-Crume Co. v. Peurrung* (1898), 86 Fed. R. 439.

urer from selling to others, is ordinarily harmless, the public not being prejudicially affected. In sustaining the contract the court said: "Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire produce to one buyer, who would thereby be enabled to monopolize the market. But if each independent producer contract to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce or to have made a contract in illegal restraint of trade."¹

It is apparent that this case may be cited only in support of the proposition that an innocent party acting in good faith can enforce a contract which he has entered into with parties to an illegal combination.

§ 231. Combination of pottery makers.—Eight manufacturers of certain pottery, and who produced nearly all of that particular ware manufactured in the country, entered into an association and agreed to regulate the price of the ware according to the dictates of the majority of the members of the association. This agreement to control prices according to the vote of the majority was held contrary to public policy.²

A member of this association, viz., the Trenton Potteries Company, purchased the entire interests of five of the other members of the association, thereby controlling a majority of the votes in the association and the fixing of the prices. After a time the association fell apart. The Trenton Potteries Company not only purchased the assets and business of the five members of the association, but also purchased the plants and assets of four other makers of similar pottery, and in each of these contracts of purchase it was provided that the vendor should not engage in the same business "within any state in

¹ "The transaction with Peurrung Bros. & Co. was on its face legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Company understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes and controlling prices. The principle, if we

admit that the purpose of the Carter-Crume Company was illegitimate, is that which is applied to so-called wagering contracts. The proof must show that the illegal purpose was mutual."

² Trenton Potteries Co. v. Olyphant (1899), 43 Atl. R. 723.

the United States of America, or within the District of Columbia, except in the state of Nevada and the territory of Arizona, for the period of fifty years." The court decided broadly that the contracts of purchase and the incidental contracts connected therewith were not illegal and could be enforced; that the public interest was sufficiently protected by holding the agreement for the control of prices to be void. The court further held that the territory covered by the provision of the contract restraining the vendors from engaging in competing business was too large, but that the contract in this respect was divisible, and that the vendors could be restrained from engaging in business in territory where the business had been formerly conducted.¹

¹ Referring to the argument that the contract was in restraint of trade the court said:

"It is next to be considered whether the decree can rest upon the ground that the contracts sought to be enforced are in illegal restraint of trade. The contract contained in the letter of January 23, 1891, and the covenant of June 6, 1892, are the obligations which the bill was filed to enforce. They are identical in terms and purport to bind respondents to absolutely refrain from engaging in the business of manufacturing pottery ware 'within any state in the United States of America, or within the District of Columbia, except in the state of Nevada and the territory of Arizona, for the period of fifty years.' They are contracts in restraint of trade. This court, speaking by Chief Justice Beasley, more than thirty years ago, declared that contracts in general restraint of trade are illegal. *Brewer v. Marshall*, 19 N. J. Eq. 537. The learned chief justice found that to have been the undisputed rule of the English and of our own courts since the decision, in 1711, of *Mitchell v. Reynolds*, 1 P. Wms. 181. In that celebrated case Lord Macclesfield placed the illegality of such contracts upon the sole

ground of their being inimical to the public interest or public policy. To the same origin the rule denying validity to such contracts was attributed by the chief justice in our leading case above cited. Our court of chancery has announced and applied the rule, and upon the same ground. *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. R. 37; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. R. 348; *Althen v. Vreeland*, 36 Atl. R. 479. In determining what is the public policy in this regard we have, however, to take into account certain contracts which restrain trade. It is of public interest that every one may freely acquire and sell and transfer property and property rights. A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business, with its good will. It is of public interest that he shall be able to make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from

§ 232. This case lays down the following broad propositions:

1. Contracts by independent manufacturers or traders looking to the control of prices of their commodity, either by limitation of production, or by restriction of distribution, or by

engaging in the same business in competition with that which he has sold. His contract to abstain from engaging in such competitive business is a contract in restraint of trade, but one which, from the time of *Mitchell v. Reynolds* to this time, has been recognized as not inimical to, but permitted by, public policy. Therefore while the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases. Contracts of this sort, which have been sustained and enforced by courts, have been generally declared to be such as restrain trade—not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public interest. This is the doctrine declared and applied in the court of chancery and is recognized in this court by our affirmance of its decrees. *Richardson v. Peacock*, 26 N. J. Eq. 40; *Id.*, 28 N. J. Eq. 151; *Id.*, 33 N. J. Eq. 597; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. R. 37; *Finger v. Hahn*, 42 N. J. Eq. 606, 8 Atl. R. 654; *Id.*, 44 N. J. Eq. 604, 17 Atl. R. 1104; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. R. 348. It is observable that of late, and elsewhere, it has been questioned whether the rule as thus stated is not too broad to be applicable to present conditions. In 1711 trade was subject to limitations, which have largely diminished or ceased to exist. When orders and responses had to be transmitted by mail or messenger, and the mail and travelers were carried by coaches

drawn by horses, and goods were transported by pack or wagon, the area of the trade of a manufacturer or tradesman was necessarily limited by those conditions. Now that orders and responses may be transmitted for long distances by telephone, and over the world by telegraph, and goods and travelers may have quick transit over land and sea, the area of such trade may be immensely greater. Thereupon it is contended with great force that the true test of the validity of such contracts in restraint of trade may be found alone in their being reasonably essential to the protection of the purchaser, and that, considering the vast extent of the area of some trades, there are cases in which a general restraint cannot be held to be unreasonable. *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. R. 419; *Nordenfelt v. Ammunition Co.* (1894), App. Cas. 535; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Cloth Co. v. Lorisont*, L. R. 9 Eq. 345; *Machine Co. v. Morse*, 103 Mass. 73; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553; *Underwood v. Barker* (1899), 1 Ch. 300. The question thus suggested does not arise in this case, unless the contracts before us are found to be contracts in general restraint of trade. This leads us to inquire whether they are general, or only partial, in their restraint, and, if the latter, whether they extend beyond what is reasonable for a fair protection of the business and good will which appellant purchased from respondents.

“The contention on the part of respondents is that the contracts in question restrain them from engaging in the business of manufacturing

express agreement to maintain specified prices, are opposed to public policy. No court will enforce such an agreement or award damages for any breach thereof.

2. Any person engaged in any manufacture or trade, having

pottery ware in the area comprising the whole United States, and that the exception of one state and one territory was illusory and colorable, because they claim the proofs show that such manufacture cannot be carried on in those localities with profit. It is insisted that a restraint extending over the whole nation is a general and not a partial restraint. It was well said by Judge Andrews in his opinion in *Match Co. v. Roeber*, *ubi supra*, that 'the boundaries of the states are not those of trade or commerce.' It may also be said that in these days the business of many a concern extends, not only beyond the boundaries of the state in which it has a local habitation, but even beyond the limits of the nation. Yet the public policy of that state may be invoked in favor of or against the restraint of such trade, however widely extended. It is possible to conceive of a business so widely extended that a restraint of it within the limit of one country might be in fact but a partial restraint. In the case last cited an exception of one state and territory similar to that contained in the contracts in question was pronounced not colorable, but the case does not indicate that the exception was shown by the proofs to be of territory in which the restrained manufacture could not be carried on with practical results. In this case the proofs establish that to be the fact as to the area included in the exception. It is contended for appellant, however, that the fact so established is immaterial, because the rule against general restraint of trade is an arbitrary one, and an exception from the restraint,

however unsubstantial or illusory, will make the restraint partial. It is not easy to perceive how a rule of this character, founded on considerations of public policy, and applied in the public interest, can be rightly deemed arbitrary in the sense intended in this contention. Nor is it obvious that the courts would permit the evasion of the rule by illusive contrivances. But the question presented need not be decided, unless the contracts, properly construed, extend the restraint of respondents over the whole area of the United States, except the excepted parts. If by the true construction the contracts are divisible, and bind respondents to a restraint in one or another of separately described areas, and, as applied to one or more of such areas, the restraint is not unreasonable, the suggested question need not be solved. The area or areas within which the restraint upon respondents is engaged for in these contracts is described as being not, as stated in the opinion below, within any state 'of' the United States of America. In seeking the meaning of this description we are to be guided by the ordinary rules of construction. We may presume that the contracting parties intended to make a valid contract in this case, under the doctrine enunciated in *Brewer v. Marshall*, that they designed to contract for a restraint which would be partial and not general, and reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of the purchase. The contracts are to be construed so as to give them validity, if such construction does no violence to their lan-

the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors.

3. Competition may be at once affected and ultimately sup-

guage; and the subject-matter of the contracts is to be considered, and their terms are to be construed, in reference thereto. Here the transaction was the sale and purchase of an established business, with its good will, and the contracts in question were plainly intended to furnish protection to the purchaser in the enjoyment of the things purchased. Respondents received a large sum of money for what they sold appellant, which they yet retain, and it is clear that the consideration thus received and retained must have been enhanced in amount by the obligation of the contracts now in question, and that so much could not have been obtained by respondents if no obligation to restrict competition had been made. Examining thus the description of the area within which the restraint agreed to by respondents is to operate, I have reached the conclusion that, without doing any violence to the language or straining its import, it may be and ought to be held to be a divisible description, embracing not one whole area, but several areas disjunctively described. The exception of the territory of Arizona is urged as inconsistent with this construction. But the express inclusion of the District of Columbia equally militates against the contrary construction, for, if the description covers the whole area of the United States of America, the District of Columbia was already included. Looking at the subject of the contracts, their presumed intent, and the purpose of any agreement to restrain respondents from engaging in a competitive business, the description can be read as applicable

disjunctively to different areas,— as within the state of Maine, within the state of New Hampshire, or within the state of New Jersey, etc., or within the District of Columbia, excepting, etc., and such should be its construction. Thus read, the contracts in question are applicable to all the described areas, and are enforceable in those of them in which the restraint contracted for is reasonably required for the protection of appellant in the use and enjoyment of the business and good will acquired from respondents. An instructive case on this point has lately been decided in England. The question arose upon a covenant by an employee with his employer that within twelve months after leaving his employment he would not engage in a similar business 'in the United States or in France, or in the kingdom of Belgium or Holland, or in the Dominion of Canada.' The employee voluntarily left the service of his employer, and entered into the employment of a merchant in the same trade in England. Upon a bill by the first employer, Kekewich, J., allowed an injunction against the breach of the covenant. Upon appeal the cause was heard in the chancery division, before Lindley, M. R., and Rigby and Vaughan Williams, L. JJ. The master of the rolls and Rigby, L. J., held that the covenant was a separable one, and was not unreasonable, as to the restraint imposed on the covenantor within the United Kingdom, and they sustained the injunction. Vaughan Williams dissented, but upon the ground that the restraint within the whole of the United Kingdom was un-

pressed by a party purchasing one after another the plants, business and good will of competitors, and, in the absence of legislative restrictions — even if such could be imposed — upon the acquisition of such properties, courts can impose no limitation upon the freedom to make such purchases, but, on the contrary, are obliged to enforce such contracts notwithstanding their effect is to diminish or even to exclude competition.

4. In these respects the corporation, unless restricted by the laws of the state under which it is organized, may exercise the

reasonable. *Underwood v. Barker, ubi supra.*

“It is next to be considered whether the contracts in question, thus construed, were reasonably required for the protection of appellant, and to what extent, if any, they should be enforced, under the proofs in the cause. It appears by the proofs that the business which appellant purchased of respondents had been carried on by them within an area, roughly speaking, covering the states east of the Mississippi river, and north of a line drawn through Richmond and Louisville, including the District of Columbia. Appellant contends that such contracts were reasonably required to protect, not only in the areas in which the business it purchased of respondents had been carried on, but also in other states to which it might extend that business. But this contention I deem to be inadmissible. The validity in this respect of such contracts is to be tested by the effect upon the business and good will sold and purchased. What is reasonably required to protect that may be upheld. But the vendor can no more contract to restrict his use of his trade or calling beyond such protection than he could do if he had made no sale at all. Such a contract would be opposed to public policy.

“But while it results from this view that the contracts in question, so far as they restrain respondents from engaging in the same business

in localities in which the business purchased by appellant of them had never been carried on, may be opposed to public policy, it does not follow that they are wholly unenforceable. Contracts including distinct and separable obligations, some of which are legal and some prohibited, are enforceable as to such obligations as are legal. *Union Locomotive & Exp. Co. v. Erie Ry. Co.*, 35 N. J. Law, 240; *Stewart v. Railroad Co.*, 38 N. J. Law, 505. These contracts, as to areas described therein in which the acquired business had been carried on, may be enforced upon proper proofs. Upon the proofs, how far may these contracts be enforced? The prayer of the bill is for an injunction in the terms of the contracts. But this would be too broad a restraint on respondents, because it would include localities in which the purchased business had never been carried on, and where no protection of it was required. Upon the proofs, I conclude that no restriction can be imposed upon respondents as to any area beyond the state of New Jersey. In this state all the respondents, except Richard C. and Henry D. Olyphant, are actively engaged in the very business they contracted not to engage in. There is some proof of sales and solicitation of trade in other prohibited areas, but it lacks the requisite certainty to justify a broader injunction.”

powers of an individual and may purchase the plants and business of competitors, even though such purchases may diminish or for a time destroy competition.

5. And in such contracts of purchase agreements may be embodied binding the vendors not to engage in the same business within a limited area for a limited time, provided the restraint so imposed is not larger than is reasonably necessary to protect the purchaser in the enjoyment of his or its contract.¹

¹ Inasmuch as this case is a comparatively recent interpretation of the laws of the state of New Jersey by the New Jersey supreme court, the following from the opinion will be of interest:

"It remains to consider whether the contracts in question are otherwise against the public policy of our state. The learned vice-chancellor held them to be opposed to the public interest, because he conceived that they tended to create a monopoly in the business of manufacturing sanitary pottery ware. This effect he deemed established by the proofs that appellant, simultaneously with its purchase from respondents, also purchased four other plants used in the manufacture of such ware in Trenton, and the property, business and good will of their owners, and took from each of those vendors contracts restraining them from engaging in the business of manufacturing pottery ware, substantially identical with the contracts taken by it from respondents. The contracts procured from respondents he deemed to be a part of a scheme to control the production, distribution and sale of sanitary pottery ware, and to exclude competition therein. Such ware he declared, on the authority of the promoters of appellant, to be a necessity of life. The scheme held to be reprehensible was found in the situation disclosed in the proofs. Respondents, as owners of the business sold

to appellant, had, several years before the sale, united with the owners of seven other potteries in Trenton, which made, among other things, sanitary pottery ware, in an association called the American Sanitary Potters' Association. That association had in some way controlled the prices at which such wares produced by its eight members (counting the owners of each pottery as one member) should be put upon the market. The action of the association in that regard was determined by a majority of its eight members. By its purchases appellant acquired the interest of five of the members, and seems to have been permitted to cast a vote for each in controlling the action of the association. After appellant's purchases prices were so controlled for some time, and until the association fell to pieces. Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are without doubt opposed to public policy. The contract of the Sanitary Potters' Association in this regard was inimical to public interest when respondents were members of it, and none the less so when appellants acquired the property of five of its members. However solemnly the members of that association may have obligated

§ 233. Combination among buyers of produce.— Certain buyers of produce and country merchandise in a village entered into a copartnership agreement whereby each of the partners agreed not to transact business on his individual account within

themselves to obey the behests of the majority in respect of the control of prices of their ware, no court would have enforced their agreements, or awarded damages for any breach of them. But the contracts by which appellant acquired the property and business of respondents and of four other members of the association contained no term stipulating for the continuance of the association, or for the enforcement of any objectionable agreements it had entered into. At the most, so far as appears, the contemporaneous purchases by appellant gave it an opportunity to use the majority vote in the association for such control of prices as its agreements provided for. Although the control of the voting majority of the association may have been one of appellant's motives for making its simultaneous purchases, it is inconceivable that any one of the five vendors could have repudiated his contract to sell to appellant on the ground that such sale, if consummated, would enable appellant to obtain such control. The public interest would be amply protected by invalidating the agreement of the association for the control of prices, and the disconnected agreement of sale would be enforced as other contracts.

"It is further urged that the simultaneous contracts procured by appellant create or tend to create a monopoly, because they stipulate for the removal of any competitors in the business of manufacturing sanitary pottery ware. The owners of five of the eight potteries in Trenton manufacturing that kind of ware (and there were but few, if more

than one, elsewhere) thereby agreed not to engage in that business for a long period of time and over a great extent of country. The engagement of respondents in that respect has been found not to be an improper restraint of trade, nor inimical to public policy on that ground, but a contract partially enforceable upon respondents, if not otherwise objectionable. The engagements of the other vendors who sold their properties and business to appellant are similar in terms to that entered into by respondents, and furnish a reasonable protection to appellant of the business and good will purchased by it of each of them. Each sale and each incidental contract against competition are, for reasons above given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made, they excluded from engagement in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture? It is to be observed that the contracts of respondents and the other vendors to appellant restricted them from engaging in the business of manufacturing, not sanitary pottery ware alone, but all pottery ware. The proofs show that a large number of persons are engaged in manufacturing pottery ware in various parts of the country, and that the contracts in question would exclude from competition a very small proportion of them. But as the proofs also show that the main purpose of appellant was to engage in the manufacture of sanitary pottery ware, I have stated the proposition in a more restricted form. Whether sanitary

twenty miles of the village in which the copartnership was to do business. This agreement was sustained upon the following grounds:

1. The business contemplated by the copartnership was of a lawful and unobjectionable character.

pottery ware has become a necessity of life is open to question. It is certain that many persons manage to exist without using it. But if its use is of importance to health and comfort, and a considerable and increasing number of persons desire to acquire and use it, the public may have such an interest in its manufacture and sale that public policy will justify judicial interference and refusal to enforce illegal combinations to enhance its price. The elimination of competition may produce that result. The contracts in question were not intended to withdraw, and do not appear to have withdrawn, from work, a single workman in that industry. They restrain a comparatively small number of capitalists, who had previously employed their capital in such manufacture, from continuing so to do. The entire capital of the country, except theirs, is free to be employed in the manufacture. There seems to be no ground for the claim that we should refuse to enforce respondents' contracts by injunction, when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains. The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the purchaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the

courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude, competition. But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregation on individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or

2. It does not require argument or citation of authority to show that five or any other number of men may lawfully form a copartnership to buy produce and sell merchandise at any village or place; the law does not require that the parties to the copartnership should compete in the purchase of produce. Individually each partner had the right to buy produce as low as he could, and collectively they have the same right, unless deception or fraud is practiced on the public.

3. If, however, the agreement was made as a matter of fact for the purpose of preventing competition in the market, and with the intention of keeping the agreement secret from the public so that an appearance of competition might be maintained, such secret fraudulent intention would vitiate the agreement. The agreement in this case disclosed no such secret intention — no conspiracy, so to speak — and is therefore valid.¹

imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grants to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time, at least, destroy, competition. Contracts for such purchases cannot be refused enforcement. Since contracts by individuals, and by corporations having legislative authority, for the purchase of competing plants and business, may be made, and are enforceable, although as a result thereof competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased cannot be declared by the

courts to be repugnant to public policy. The interference with competition resulting from such purchases under legislative permission being found not to invalidate contracts for such purchases, the like interference by contracts reasonably required for the protection of the purchaser cannot be held to invalidate them."

¹ Fairbank et al. v. Leary (1876), 40 Wis. 637. The court in its opinion said:

"By the terms of the instrument a copartnership between the parties to transact a lawful business in an apparently lawful manner was formed. Of course it does not require argument or citation of authority to show that five or any other number of men may lawfully form a copartnership to buy the produce of the country and sell merchandise at Waupun or any other place.

"But it does not necessarily follow that the agreement under consideration is a valid one. Although not expressed therein, if that agreement was in fact made for the purpose of preventing competition in the markets in which the firm might operate, and with the intention of keeping

§ 234. Combination between buyers and sellers of sheep and lambs.—A corporation engaged in the business of buying and selling sheep and lambs, the stockholders of which were engaged in the business of butchering sheep and lambs for the New York market, entered into an agreement with another corporation engaged in the business of selling sheep and lambs

secret from the public the existence of the agreement, and if its existence was thus kept secret, and an appearance of competition maintained by them towards the public, such executed intention of secrecy and deception tainted the agreement itself, and rendered it illegal and void. In that case no rights can be enforced under such illegal agreement by any party against another party thereto.

"The law does not and did not require that these parties should compete in the purchase of produce. Individually each had an undoubted right to bid therefor as low as he pleased. Collectively they had the same right, unless deception was practiced on the public. But if they held themselves out as competing purchasers, and knew that the people who sold in the markets where they operated relied upon such competition (as well as they might) as a guaranty that they were obtaining the full market value of the produce, while at the same time the purchasers were not in competition, but in secret league to depress the market, the agreement under which the latter operated is illegal and void, and no court will lend its aid to enforce any of its stipulations. The cases which hold that secret agreements between persons attending auction sales not to bid against each other, and to divide the property bid off by one of them, are illegal, go upon the same principle. These views are fully sustained by the authorities cited by counsel for the defendant; to which we add Morris

Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173. The case of Craft v. McConoughy, recently decided by the supreme court of Illinois, and reported in 3 Monthly West Jur. 238, is an instructive case, and very similar in its facts to the case under consideration.

"It only remains to determine whether the complaint shows on its face that the agreement was entered into with the unlawful intention above mentioned. The only averment thereof which it is claimed shows such intention is the following: "Each of said firms operating independent of each other or any member of said copartnership, and in the same manner as they had theretofore done, and as though the said copartnership did not exist." But we think the agreement cannot fairly be so interpreted. It may be true, and yet there may have been no intention of secrecy—no conspiracy, so to speak; the true relations between the parties may have been notorious, and all persons selling produce in the markets where the firm was a purchaser may have known that the members of it were not in competition.

"If the agreement between the parties is valid and binding upon them, the complaint states a cause of action against the defendant. Finding nothing in the complaint which shows such agreement to be illegal, we must hold that the demurrer thereto was properly overruled."

on commission, which agreement provided that for a period of three years the stockholders of the first corporation should buy their sheep and lambs from members of the last-named corporation, agreeing during the same period to sell sheep and lambs for the New York market only to the stockholders of the first corporation.¹

The agreement was sustained on the ground that the contract was neither directly nor impliedly prohibited by the act under which the plaintiff corporation was organized, or by any statute of the state of New York; also upon the ground that the contract was not beyond the limit of powers ordinarily vested in corporations for the necessary promotion of their business. The defendant, as one of the stockholders who executed the agreement, shared in the pecuniary advantages which had resulted from a similar contract which had expired, and of which the agreement in question was a renewal, and he was therefore estopped from setting up the defense that the contract was *ultra vires*. The law will not presume an agreement to be void as against public policy when it is susceptible of a construction which would make it legal.²

§ 235. Combination of mill-owners and warehousemen.— The mill-owners of Milwaukee entered into an agreement to pay the warehousemen a certain amount per bushel on wheat coming into the Milwaukee market, in so far as the mill-owners

¹ "For the purpose of enforcing on the stockholders of the plaintiff corporation compliance with the terms of this agreement of January 8, 1884, the stockholders of the plaintiff corporation, including the defendant, entered, on January 25, 1884, into an agreement with each other and with that corporation, that each of them should pay to the plaintiff corporation the sum of twenty-five dollars for each car-load of sheep and lambs purchased by him from any individual or firm, member of the said Sheep Brokers' Association, after having been notified by the plaintiff not to purchase. The defendant did purchase from a firm member of the Sheep Brokers' Association after having been notified not to do so, and

this action is brought to recover seventy-five dollars due by him to the plaintiff under the last mentioned agreement." *Live Stock Ass'n v. Levy*, 54 N. Y. Sup. Ct. 32.

² There is no violation of law or of public policy in an agreement between two traders that one should sell to the other all its commodities and the other buy from the former corporation alone. *Chitty on Contracts* (11th Am. ed.), 982, 983 and notes. A contract to sell exclusively to a particular person for a limited time is not invalid (*Van Marter v. Babcock*, 23 Barb. 633); nor a contract not to engage in a special business for a certain period (*Curtis v. Gokey*, 68 N. Y. 300).

were able to control the same; and the warehousemen on their side agreed to give the mill-owners the control of the Milwaukee wheat market for a certain period, in so far as the warehousemen were able to do so; and they agreed not to deal in wheat during the time covered by the agreement, or make any contracts for storage of wheat except as agents of the mill-owners.

It was urged that this agreement was in restraint of trade and void as against public policy; in short, that the association amounted to an illegal combination.¹

§ 236. In holding that the agreement was legal upon the following grounds the court said: "We need not be frightened by the terms employed to characterize it."

1. The agreement "to give the parties of the first part (namely, the millers) full, absolute and uninterrupted control of the Milwaukee wheat market" is materially qualified by the words, "so far as they (the warehousemen) shall be able to do so;" and such an agreement so qualified does not amount to an agreement to give an illegal monopoly.

¹ Kellogg v. Larkin (1851), 3 Pin. (Wis.) 123, 56 Am. Dec. 164. Referring to the doctrine of public policy, the court, after quoting from Story's Conflict of Laws, section 546, said: "As a general rule the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses. And a legislative enactment would seem to be the least objectionable form of exposition, for these two reasons: 1. Because it would operate prospectively as a guide to future negotiations, and would not, like a judgment of a court, annul a contract already concluded in good faith and upon a valuable consideration; and 2. Because a rule so established has a wider circulation among the people and enters more generally into the information of the public.

I by no means intend to deny the right or the propriety of judicially determining that a contract that is actually at war with any established interest of society is void, however individuals may suffer thereby, because the interest of individuals must be subservient to the public welfare. But I insist that before a court should determine a contract which has been made in good faith, stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. And I submit that he is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state."

2. The agreement is still further qualified by the words: "so far as they shall be able to do so by virtue of their capacity of warehousemen, vessel and dock owners." This amounts simply to an agreement to give the mill-owners such control of the Milwaukee wheat market as the warehousemen can give by reason of their specified employment. This amounts to a transfer of whatever control the warehousemen possess over the market to the mill-owners, and such transfer is legal.¹

¹ The court proceeds: "But the parties are said to have combined, and agreed not to engage in trade, and that this was clearly against public policy; and in the plea, the plaintiffs and defendants, together with divers other persons, are averred to have formed themselves and entered into an association. Let this matter be understood, and we need not be frightened by the terms employed to characterize it. The agreement discloses no combination and no association in the sense in which the words are evidently used. It is of two parts. It creates mutual obligations, and provides mutual equivalents as every contract *inter partes* does. But there is no identity of interest or of duty between the parties of the second part, no more than always exists between landlord and tenant. The warehousemen received their daily compensation, and the millers received their daily profits.

"And there was no combination between the parties of the second part, the warehousemen. Perhaps they must be considered to have jointly promised the party of the first part, but it is not disclosed that they have promised each other, which, I understand, they must have done before they can be said to have combined. Besides, if the design be lawful, as the abandonment of trade in a particular place is, what matter how many combine in it? But at all events, it is said that, as creating a particular restraint, the contract is

prima facie bad; and the facts and circumstances which will justify it, if any such exist, should be made to appear.

"True, the language of the contract is that the parties of the second part 'agree to give the parties of the first part full, absolute and uninterrupted control of the Milwaukee wheat market;' and had it stopped here, it might well have been urged that there was an agreement for the monopoly of the trade in that market. And if that had been the only market for Wisconsin (which it is not), it might well be said the agreement was as pernicious as an agreement to strike the sun from the system. Either, if performed, would be ruinous to the farmers of Wisconsin; but I submit that the impossibility of performing would constitute as good a reason for holding either of them void as the injurious consequences certain to result from performance. But this stipulation is qualified by using the words 'so far as they shall be able to do so;' and had they stopped here, to any objection that a monopoly was agreed upon it might well be answered that the giving of such control or such monopoly (if they are synonymous terms) of the Milwaukee wheat market as those parties could give, was no monopoly at all. But the agreement is still further limited by the words 'by virtue of their capacity of warehousemen, vessel and dock owners.'

"It is, then, simply an agreement

§ 237. Combination of stevedores.—A certain number, but not all, of the firms and individuals engaged in the business of stevedoring in the city of San Francisco, entered into a contract providing for the formation of an association to be known

to give to the mill-owners such control of that market as they can give by virtue of those specified employments. In other and equivalent terms, it is a transfer of such control as the obligors possessed in right of their employment as warehousemen, etc. Such are the general terms selected by the draftsmen to express the complete abandonment of that trade in that market to the obligees.

“Personally, the obligors were to do nothing to confirm the mill-owners in that trade to the exclusion of anybody but themselves. Accordingly they go on to render the nature and meaning of the stipulation more definite by specifying several things which the parties of the second part shall not do, but not one which they shall do.

“It is unnecessary to examine the cases cited by counsel in support of the proposition I have here been combating. They all arose upon royal grants or by-laws, and consequently were cases of involuntary restraints. They do establish the doctrine that the grant of a monopoly is void; but they do not support the averment of the plaintiff in error that this contract disclosed a monopoly. Upon this point better authority may be found in the language used by Bronson, J., in *Chappel v. Brockway*, 21 Wend. 157. To a similar averment he replied: ‘The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world

beside are left at full liberty to enter upon the same enterprise. . . .’

“But the distinction between the case at bar and the case referred to is too apparent to require illustration. And I would not have felt called upon to notice those cases at all, but that they have been supposed to sustain two other decisions pronounced by the supreme court of New York, and which are claimed by the plaintiffs in error to be entirely decisive of the main question presented upon this record. I refer to the cases of *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; and *Stanton v. Allen*, 5 id. 434, 49 Am. Dec. 282. These cases arose upon contracts between different transportation companies upon the Erie canal, by which the parties agreed to stock their capital and turn their earnings into a common fund to be then apportioned between the different proprietors under certain regulations contained in the articles of agreement.

“The purpose assigned for the arrangement was the establishment of fair and uniform rates of freight, so equalizing the business among themselves as to avoid all unnecessary expense in doing the same. In the case first mentioned the agreement was held to be void as conflicting with a statute of that state. In the second case the same court held the agreement void at common law. In the former case *Jewett, J.*, remarks: ‘It is a familiar maxim that competition is the life of trade. It follows that whatever destroys, or even relaxes, competition in trade is injurious, if not fatal, to it.’ And in the latter case *McKissock, J.*, observes

as "The Master Stevedores' Association." The object of the association was "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The associ-

that: 'While the introductory terms of the agreement proposed nothing apparently objectionable, the ultimate object is very manifest, and is of a different character. It is nothing less than the attainment of an exemption of the standard of freights, and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition.' And again: 'As the canals are the property of the state, constructed at great expense, as facilities to trade and commerce and to foster and encourage agriculture, and are at the same time a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interest of the whole state. If, then, in addition to the evils already pointed out as incident to this confederacy, a diminution of the revenue of the state would follow, of which there can be no doubt, as our canals have rivals by no means impotent in the great inland carrying trade of the north and west, the question whether the association can be upheld becomes one of momentous import.'

"Such reasons are assigned in support of the judgments pronounced in these cases. I would be reluctant to subscribe to them. I think it would be unsafe to adopt as a rule of law every maxim which is current in the counting-room. It was said some three hundred years ago that trade and traffic were the life of every commonwealth, especially of an island. *City of London's Case*, 8 Co. 125. If it be true also that competition is the life of trade, it may follow such premises that he who relaxes competition commits an act

injurious to trade; and not only so, but he commits an overt act of treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is the least reliable of the host that may be picked up in every market-place. It is in fact the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. . . . I believe universal observation will attest that for the last quarter of a century competition in trade has caused more individual distress, if not more public injury, than the want of competition.

"Indeed, by reducing prices below, or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other seldom resort to contract, unless they find it the cheapest mode of putting an end to the strife. And it seems to me not a little remarkable, that in the case of *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, it should have been urged against the agreement that its object was to exempt the standard of freights, etc., from the wholesale influence of rivalry and competition. For it is very certain that because of that very purpose, because they did tend to protect the party against the influence of rivalry and competition, courts of law have upheld like agreements in partial restraint of trade ever since the case of *Mitchel v. Reynolds*, *supra*, was decided. And upon

ation was to continue five years, and was given power through a majority vote of its members to "fix a schedule of prices or charges for any and all work as stevedores to be done and performed by its members, and they hereby agree that they will each of them observe and abide by such schedule of prices or charges, and that none of them will do or perform any such work at or for less or lower prices, or suffer or allow any discount to be made therefrom, except as may be allowed or authorized by the association." Each of the firm and parties hereto is to carry on the business of master stevedores, according to the provisions of this agreement, in their own names as heretofore, for the benefit of this association; and each agrees to do so in an efficient and economical manner, and that their disbursements shall be subject to examination and approval or disapproval as herein provided." Each member was required to keep accurate accounts of the business done by him, including receipts and disbursements, and render statements to the association, and the agreement provided for the payment of a certain sum as liquidated damages for any violation of the provisions of the contract.¹

the argument of this cause it was earnestly contended that some such object should have been expressly averred by the plaintiff in his declaration, in order to support the restraint imposed upon the lessor by one of the covenants in the lease declared upon.

"But upon the abstract question whether the agreements disclosed in those cases did contravene public policy, the decisions therein pronounced are entirely conclusive upon us. And if the policy of that great state imposes upon her citizens the obligation of unrestrained and unrelenting competition in the business of transportation upon her canals, in order to swell the revenues from that already munificent source, I have nothing to urge against it.

"I am not sure I should have discovered the rule applied in the determination of those cases had it not been disclosed to me by the high

authority of that court. Entertaining the views I do of the extreme caution to be observed in setting aside *bona fide* contracts in behalf of public policy, I am not sure I should have found, as a legal presumption, that when the parties to those contracts had combined their efforts and capital in order to diminish their expenses and increase their profits, they would have so abused the advantages thereby secured as to drive the carrying of trade into the hands of those potent rivals, and thus sacrifice all profit."

¹ *Herriman et al. v. Menzies et al.* (1896), 115 Cal. 16, 85 L. R. A. 318, where the court said:

"It is contended that the contract contemplates an illegal scheme and combination to stifle competition in the stevedoring business, and is in restraint of trade, and that its effect is to create a monopoly; and that in these respects it contravenes public

§ 238. This agreement was sustained upon the grounds:

1. That it did not appear that the parties to the combination were in control or anything like the control of their business in San Francisco to such an extent as to enable them to dictate prices.

policy, and is opposed to good morals, and so constitutes no proper basis for an action either at law or in equity. We are unable to coincide in this construction of the contract, or to perceive anything therein which renders it invalid upon the ground stated. The objection that its effect is to create a monopoly in and unduly restrict the business of stevedoring does not find support in its terms. A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. Anything less than this is not monopoly. Webster defines it as 'the sole power of dealing in any species of goods,' and Bouvier as 'the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise.' And these definitions accord with that given by later writers. Spelling, Trusts, 133. An agreement the purpose or effect of which is to create a monopoly is unlawful if it relate to some staple commodity, or thing of general requirement and use or of necessity, and not something of mere luxury or convenience. Assuming that the business of stevedoring is a thing which is the proper subject of a monopoly within this definition, there is nothing in this agreement to render it obnoxious to that objection, nor anything to show that it will operate to un-

lawfully restrain trade. It nowhere appears therefrom that the parties to this contract, by the combination of their business interests provided for, are in the control, or anything like the control, of that business in San Francisco, to an extent to enable them to exclude competition therein, or control the price of such labor or business. There is absolutely nothing to show that they comprise more than the most insignificant part or fraction, either in number or volume of business, of those engaged in that trade in this community. We are not at liberty to indulge in inferences which would restrict the parties in their right to combine their interests. Parties are to be given the widest latitude to make contracts with reference to their private interests (*Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 465), and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. Appellant says that the purpose of this contract is expressly declared as that of 'controlling the business of stevedoring,' and that this implies an improper restriction of that business and a monopoly. But the language of the contract is 'to govern and control the business of master stevedores, to be carried on by its members.' This is a very different thing from a combination to control the entire business of stevedoring. Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable and

2. Parties are to be given the widest latitude to make contracts with reference to their private interests, and the court is not at liberty to indulge in inferences which would restrict parties in the right to combine their interests.

do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. The supreme court of Illinois says in *People's Gas Light & C. Co. v. Chicago Gas Light & C. Co.*, 20 Ill. App. 492: 'The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern cases.' Maule, J., in *Proctor v. Sargent*, 2 Scott, N. R. 289, remarked that 'many persons who are well informed upon the subject entertain an opinion that the public would be better served if, by permitting restrictions of this sort, encouragement were held out to individuals to embark large capitals in trade, and that it would be expedient to allow parties to enter into any description of contract for that purpose that they might find convenient.' Greenhood, Pub. Pol. 689, and cases cited. And in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, it is said: 'The old doctrine of the common law that contracts in restraint of trade are void is no longer to be rigorously insisted upon precisely as it was insisted upon in the earlier cases in which it was announced. It has been modified by the more recent decisions, as the laws of trade have become better understood during the development of our commercial system, and the changes which have been introduced in the social system. *Presbury v. Fisher*, 18 Mo. 59; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355. It is not that contracts in restraint of trade are any more legal and enforceable

now than they were at any former period, but that the court looks differently at the question as to what is a restraint of trade.'

"We find nothing in the terms of the present agreement which would necessarily work an unreasonable restriction in the manner of conducting the business in question, or which would necessarily interfere with the freedom or right of others not parties to the contract to engage in and carry on such business. The parties themselves, it is true, have combined their business as severally carried on by them, and have agreed to be bound by a schedule or rate of charges to be fixed by the association; but this in itself is not an unlawful restraint of trade so long as it does not appear that the rates to be charged are unreasonable, or the restrictions such as to preclude a fair competition with others engaged in the business. In *Collins v. Locke*, L. R. 4 App. Cas. 674, it is held that where the object of an agreement was to parcel out the stevedoring business of the port of Melbourne among the parties to it, and so prevent competition, at least among themselves, and reasonably keep up the price, it was not invalid, though its effect might be to create a partial restraint upon the power of the parties to exercise their trade. In *Master Stevedores' Ass'n v. Walsh*, 2 Daly, 1, where an agreement not materially unlike the present was entered into between master stevedores, fixing a rate of prices to be charged by the members in their business, and making a penalty for any member doing work for less, and an action was brought to enforce

3. The invalidity of agreements providing for such combinations is never to be inferred but must be made to appear clearly.

4. Combinations between individuals or firms for regulating prices and competition are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce.

such penalty for a default by one of the members, it was held that such an association was not an unlawful combination, as injurious to trade or commerce, nor the restrictions unlawful, as being in restraint of trade. 'An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular product in a particular city is not illegal, as being in restraint of trade, unless it appears that they have a monopoly of that product. Ray, Contractual Limitations, p. 223, and cases there cited. See also People's Gas Light & C. Co. v. Chicago Gas Light & C. Co., and Skrainka v. Scharringhausen, *supra*; Ontario Salt Co. v. Merchants' Salt Co., 18 Grant (U. C.), 542; Central Shade Roller Co. v. Cushman, 143 Mass. 358. In Ontario Salt Co. v. Merchants' Salt Co., *supra*, speaking of an agreement of similar import between salt manufacturers to keep up the price of that commodity, it is said: 'I know of no rule of law ever having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price,—and nothing more than this has been agreed to by the parties here.' We find nothing necessarily inconsistent with the doctrines of these cases in the cases cited by appellants. In the case of Pacific Factor Co. v. Adler, 90 Cal. 117, the language relied upon has express reference to contracts 'entered into with the object in view of

controlling and if necessary suppressing the supply, and thereby enhancing the price of articles of actual necessity.' In Santa Clara Valley Lumber Co. v. Hayes, 76 Cal. 387, 393, in the language of the court: 'The very essence and mainspring of the agreement—the illegal object—was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured.' In Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, the contract precluded the parties absolutely from shipping to or selling the commodity within a large part of the territory of the United States, and restricted the output of the powder within the territory wherein the parties were at liberty to sell; and it was held that the contract was void, as in restraint of trade. The cases from other states relied upon are as clearly distinguishable from the present as are the foregoing. After a careful review of all the authorities, we are unable to say from the terms of the present contract that it, to any extent, trenches upon the rule of public policy invoked, or that there is anything within its provisions which should preclude the parties thereto from enforcing it. This conclusion renders the motion to dismiss the appeal of no consequence."

§ 239. Combination of owners of amusement resorts.—Two keepers of amusement resorts entered into an agreement not to pay, for a period of twelve months, any *bonus* to any club or social organization as an inducement for the selection of the parks or resorts kept by them. Such an agreement is not void as against public policy. “A custom of offering a *bonus* to certain organizations to hold festivals in this private park or in that must, one would think, have a tendency to enhance the price of admission to the entertainment. An agreement to be no longer a party to such a system of unfair competition strikes us as being eminently in the interest of good morals, fair and free trade, and honest rivalry in business. If dry-goods houses in a certain town should agree to employ no drummers for trade, or hotel-keepers to employ no runners, the contract would be much of the same character, and we see nothing illegal about it.”¹

¹ By the court, in *Koehler v. Feuerbacher et al.* (1876), 2 Mo. App. 11.

The court further said: “We see nothing contrary to public policy in the contract set out in the petition, and think it is clearly one which the court must enforce. What constitutes public policy is not, perhaps, exactly determinable; it is indefinite in its nature, changing with the habits, wants and opinions of society. Forestalling, regrating and engrossing were prohibited by statute in England three hundred years ago, and were considered to be against policy so late as the time of Blackstone. They are now the great basis of profits; are not only practiced every day, but are recognized as the very life of trade, and without them it may be said that commerce, as known amongst us, would be at an end. To buy merchandise on its way to market, to buy provisions in any market and to sell them again in the same market, or within four miles of the place, or to buy up provisions in large quantities for the purpose of selling again, were statutory offenses in England in the mid-

dle of the last century, and were recognized as offenses at common law long after the repeal of the statute. It is quite safe to consider that they would not now be held to be against public policy.

“Contracts in total restraint of trade, or of marriage, against the prohibitions of statutes, to infringe a copyright, to defraud the government or third parties, to oppress third parties or prevent the due course of justice, or induce a violation of public duty, that tend to encourage unlawful or immoral acts, or that are founded on trading with an enemy, are all against public policy and void. And, probably, this is a complete enumeration of the several classes to which contracts against public policy may be reduced. Undoubtedly the courts will give no countenance to an action founded on a contract which comes fairly under any of these heads. But we fail utterly to see that the contract set forth in the petition can be brought under any one of them. It is urged that it is a combination against the public to

§ 240. Combination of gas companies.—Under the incorporation laws of the state of New York¹ the charter of the Buffalo City Gas Company authorized the company to “purchase, acquire, hold and dispose of the stock, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations.” Under this power it was held broadly that the Buffalo City Company had the power to make a contract to purchase the stocks and bonds of another gas company which owned a franchise which, if operated in competition with the former company, might be disastrous to its business; and it was also held that the Buffalo City Company might issue its own stock and bonds in payment for the stock and bonds of the rival company.²

1. The purpose of the combination, to secure itself against ruinous competition, is “a lawful purpose” within the meaning of section 42 of the Stock Corporation Law, which provides that no corporation shall issue stocks or bonds except for money, labor done, or property actually received for the use and lawful purposes of such corporation.

2. The contract is not obnoxious to section 7 of the Stock Corporation Law as being a combination with another company for the creation of a monopoly or the unlawful restraint of trade, or the prevention of competition in a necessary of life, especially where it is not shown that the purchasing company does not intend to use the plant or exercise the franchise acquired under the purchase; nor does it effect a practical consolidation of two corporations contrary to the method pointed out by the statute.³

keep up prices; but it seems very clear that it is nothing of the kind.”

¹ Sec. 40 of the Stock Corporation Law (Laws of 1890, ch. 564, as amended by Laws of 1892, ch. 688).

² *Rafferty et al. v. Buffalo City Gas Co.* (1899), 87 App. Div. 618.

³ The court of appeals in its opinion said: “It is further said that the contemplated purchase operates to effect a combination with another company for the creation of a monopoly or the unlawful restraint of

trade, or the prevention of competition in a necessary of life, contrary to the provisions of section 7 of the Stock Corporation Law. A monopoly is not constituted. No exclusive privilege or right as against individuals or corporations to manufacture and sell and distribute gas is acquired. Nor, in a more restricted use of the word ‘monopoly,’ is that condition brought about by the force of this contract. A more plausible objection to it would be that it is a

§ 241. The supreme court of Illinois arrived at conclusions somewhat opposed to the foregoing, in a case wherein an information in the nature of a *quo warranto* was filed by the at-

contract in restraint of trade to prevent competition, but it is made to appear that that objection is untenable. Contracts that are intended to effect or must necessarily result in an unlawful restraint of trade or the prevention of competition may, under certain circumstances, be enjoined, but whether at the suit of a stockholder against his own company or its directors it is not now necessary to consider. The contract of purchase here involved does not appear on its face to be in unlawful restraint of trade nor to prevent lawful competition. The avowed and apparent purpose of it is to prevent ruinous competition. It is not even shown that the Buffalo City Gas Company does not intend to use the plant of the People's Gas Light Company or to refrain from acting under the franchise of the Queen City Gas Company.

"Contracts cannot be said to be in restraint of trade where a purchase otherwise lawful is made by one party of the business and all its incidents of another party, even where the selling party enters into a covenant not to engage in the same business within a determined territory, such covenant being no wider nor broader than is necessary for the protection of the thing sold. (Diamond Match Co. v. Roeber, 106 N. Y. 473.) If such a covenant could be enforced, then the contract, being otherwise legal and unobjectionable, must, of course, be valid. But it is urged that the effect of the contract is to prevent lawful competition. It is not necessarily so. It seems to be a contract which the directors of the Buffalo City Gas Company regarded as necessary, not merely to its prosperity and for the enhancement of

its profits, but to the existence of its business. What the rivalry of the only partially developed business of the People's Gas Light Company has done already to the detriment of the Buffalo City Gas Company appears from the papers. A contract made to prevent or avoid destructive competition is not necessarily invalid. It was said in the case of the Diamond Match Co. v. Roeber (*supra*): 'We suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices are or may be unlawful, but they stand on a different footing.' In *People v. North River Sugar Refining Co.* (54 Hun, 354) Mr. Justice Barrett says: 'Excessive competition may sometimes result in actual injury to the public, and competitive contracts, to avert personal ruin, may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable, and are condemned as against public policy.' And later, it is said by Judge Gray in *Vinegar Co. v. Foehrenbach* (148 N. Y. 65): 'But not all combinations are condemned, and self-preservation may justify prevention of undue and ruinous competition, when the prevention is sought by fair and legal methods.'

"We are not able to say, and cannot adjudge from what is now before us, that the contract under consideration is anything other than a reasonable one made to prevent the apprehended consequences set forth by the

torney-general against the Chicago Gas Trust Company.¹ This case is referred to at length hereinafter under the head of "Illegal Combinations." It is sufficient to state here that the Illinois court held broadly that a corporation organized under the laws of that state for the manufacture and sale of gas had no power to purchase and hold stock in similar corporations, although such power was enumerated as one of the objects of its incorporation in the articles filed in the office of the secretary of state. While the case turned upon the powers of corporations under the general incorporation law of the state, the court laid down the broad proposition that "corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted and to accomplish the purposes of their creation."² An incidental power is one that is directly and immediately appropriate to

directors in the papers submitted in answer to this motion.

"Finally, it is suggested that the whole scheme is merely one to bring about a practical consolidation of two corporations contrary to the method which the statute points out by which such consolidation may be effected. The answer to this seems obvious. There is no consolidation either in fact or in law. Each corporation maintains its own identity. We are therefore of the opinion that no controlling legal reason is shown for the re-establishment of the injunction.

"The defendants have shown in their affidavits what apparently is an adequate reason for making the contract, based upon an actual necessity for acquiring the stocks and bonds of the People's Gas Light Company; and they have also shown that they cannot accomplish that object upon better terms than those submitted for the consideration of the shareholders of the Buffalo City Gas Company. The method of their pro-

cedure shows honesty of purpose, was entirely open and frank, was communicated in all its details and with all its consequences to the stockholders, and is referred to them for approval or rejection. Under such circumstances, the case, as was remarked by the justice at special term, presents only a matter of business judgment. It cannot now be held that the price is so exorbitant as to indicate a waste of the Buffalo City Gas Company's assets, or fraud or irregularity compelling the interference of the court. From all that appears, the course of the directors may be a wise method reluctantly resorted to, as they say, of saving their company from serious disasters attendant upon a ruinous competition."

¹ *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. R. 798.

² *C., P. & S. W. R. R. Co. v. Marseilles*, 84 Ill. 643; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 id. 530.

the execution of the specific power granted, and not one that has a slight or remote relation to it.¹

§ 242. "Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purpose."

§ 243. The court also laid down the further propositions that "the business of manufacturing and distributing illuminating gas by means of pipes laid in the streets of a city is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such a grant are of a public nature; companies engaged in such business owe a duty to the public; any unreasonable restraint upon the performance of such duty is prejudicial to the public interest and in contravention of public policy."²

"Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy, and therefore unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy."³

¹ Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 1; Franklin Co. v. Lewiston Savings Institution, 63 Me. 43.

² Chicago Gas Light Co. v. People's Gas Light Co., 121 Ill. 530; Gibbs v. Baltimore Gas Co., 130 U. S. 396.

³ 2 Addison on Cont. 743; Greenhood on Public Policy, pp. 180, 654, 655, 670; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Craft v. McConoughy, 79 Ill. 346; Central R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah R. R. Co., 43 id. 13; Trans. Co. v. Pipe Line Co., 22 W. Va. 600.

The court further said: "Of what avail is it that any number of gas companies may be formed under the

general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and through the control thereby attained can direct all their operations and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the

§ 244. Combination between parties competing for public franchise.—Where two parties contemplated applying for a franchise to construct water-works in a certain city, an agreement by which one bound himself to refrain from organizing a corporation for the construction of the works and from carrying on or prosecuting such works in order that the other party might incorporate and construct the works without competition is not void as against public policy.

1. The object of this agreement was not to suppress competition or bidding at any public sale; nor was it to suppress competition for the letting of a contract for public purposes; nor was it to influence the actions of public officials.

2. Where an individual or corporation is threatened with competition, it is neither illegal nor immoral to persuade the competitor to abandon the enterprise; and it is entirely legitimate to enter into an agreement to take the competitor into employment.¹

§ 245. Combination between publishers—The Associated Press.—The Associated Press, a New York corporation,²

state, but is in contravention of the spirit, if not the letter, of the constitution.”

¹ *Oakes v. C. W. Co.*, 143 N. Y. 430, 88 N. E. R. 461. “We think that this agreement, upon any view of the facts, does not come within that class of contracts which are forbidden or are held void on grounds of morality or public policy. There was no purpose to suppress competition or bidding at any public sale, or letting of a contract for public purposes or in restraint of trade, or to influence the action of the officials. Assuming that both the plaintiff and Cowan intended to apply for the franchise, and that the latter persuaded the former to abandon his purpose and aid him in the manner mentioned in the contract for the consideration promised, there was nothing immoral or that threatened the public interests or the public good in such an arrangement. If the business of a private individual or corporation is threat-

ened with competition, it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed and take employment with the one remaining in the business at a stated compensation. Such an agreement fairly entered into is legitimate business. If the parties in this case deemed it for the interest of both that only one application should be made for a franchise that could be granted but to one of them, the arrangement does not, as I conceive, violate any settled rule or principle or public policy.” Citing *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 id. 519; *Tode v. Gross*, 127 id. 480; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157; *Cameron v. N. Y. & Mt. Vernon Water Co.*, 62 id. 269.

² Organized under act “To incorporate the Associated Press of the state of New York” (ch. 754, Laws of 1867).

adopted a by-law prohibiting its members receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for like purpose." Suit was brought to restrain the association from enforcing the penalty of suspension for the violation of that provision. The power of the association to enact and enforce the by-law was sustained upon the ground that the by-law was neither unreasonable nor oppressive as tending to restrain either trade or competition and to create a monopoly; furthermore, that suspension of a member of the association violating the by-law was not an unlawful interference with vested property rights; nor did the by-law create any restriction upon the liberty of the press.¹

¹Matthews et al. v. A. P. S. N. Y., 136 N. Y. 333, 32 N. E. R. 981. "We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England. So that when we agree that a by-law which is in restraint of trade is void, we are still brought back to the question, what is a restraint of trade in the modern definition of that term? The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited and that it is not in restraint of trade as the courts now interpret that phrase. Some of the grounds

showing the reasonableness of the by-law are well and clearly set forth in the opinion delivered by the learned judge at the general term. Here are a number of persons who are owners of or interested in various newspapers in the state outside of the city of New York. They enter into business relations with each other, to a certain extent, through the form of an organization known as a corporation, and for the purpose, among others, of collecting and supplying themselves with telegraphic news. The greater the number belonging to the organization the larger will be its income and the greater amount it will be able to spend for making the collection of news and the more efficient and valuable such collection will be. To suppress competition in such chosen field among themselves and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem most appropriate to provide that the members of such association should not take news from any other. The division of the business among two or more associations tends directly towards the making of the membership in each less valuable

§ 246. Combination of salt producers — In Canada.— Certain corporations and individuals, engaged in the manufacture and sale of salt, entered into an agreement providing for a combination under the name of “The Canadian Salt Association,” for the purpose of controlling and advancing the salt industry. The agreement provided that all the parties to it should sell their salt through the trustees of the association and sell no salt except through these trustees. The agreement was sustained upon the following grounds:¹

1. The agreement did not create a monopoly, since it appeared that the parties to the agreement were not the only persons engaged in the production of salt in the given territory.

2. There is no rule of law which prevents a number of the producers of a staple commodity agreeing not to sell below a certain price, provided the agreement does not embrace all of the producers of the commodity.²

than it otherwise would be, and the membership being less valuable the association itself would tend to decrease in members and to grow less efficient in service and less capable of fulfilling promptly one of the great objects of its existence, the procuring and supplying of news to its members. Thus a by-law of the nature complained of would have a tendency to strengthen the association and to render it more capable of filling the duty it was incorporated to perform. A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up all such business as he had theretofore done. Such an agreement would not be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done.” *Inter-Ocean Publishing Co. v. Associated Press*, recently decided by the supreme court of Illinois, holds that the association

performs a public service, similar to telephone and telegraph service, and must therefore furnish news to all newspapers applying therefor.

¹ *Ontario Salt Co. v. Merchants' Salt Co.* (1871), 18 Grant's Ch. 540.

² In the case last cited it was said: “It is out of the question to say that the agreement which is the subject of this bill had for its object the creation of a monopoly, inasmuch as it appears from the bill that the plaintiffs and defendants are not the only persons engaged in the production of salt in this province, and therefore the trade in salt produced here by other persons, and in salt imported from abroad, will remain unaffected by the agreement, except in so far as prices may possibly be influenced by it. The objection on this head is rather that the agreement has for its object the raising the price of salt, and for that reason is illegal, as constituting the old common-law offense of ‘engrossing,’ or at least is void as being against public policy.

“Engrossing is defined to be ‘the getting into one’s possession or buy-

§ 247. Combination between owners of steamboats.—It is legal for a steamship company to enter into an agreement to pay a certain sum each month to the owner of a competing

ing up large quantities of corn or other dead victuals with intent to sell them again.' Benjamin on Sales, p. 386. In the case of *The King v. Waddington*, 1 East, 143, the defendant was convicted of the offense of trying to raise the price of hops in the market, by telling sellers that hops were too cheap and planters that they had not a fair price for their crops, and for contracting for one-fifth of the produce of two counties, when he had a stock on hand and did not want to buy, but merely to speculate how he could enhance the price. And Waddington was imprisoned for four months and fined £500, Mr. Justice Grose, in pronouncing sentence, saying that 'It would be a precedent of *most awful moment* for this court to declare that hops, which are an article of merchandise, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article the price of which it is a crime by undue means to advance.' The common law which was so severely applied in this case has since been abolished in England by the statute 7 and 8 Vic., ch. 24; and although I have been unable to discover that any similar legislation has taken place in this country, I cannot suppose that a law which would strike at a vast number of transactions which, with manifest benefit and profit to the community, are daily being entered into without the least suspicion on the part of those engaged in them that they are doing wrong, would now be applied as part of our common law. As regards the United States, Mr. W. Story, in his *Treatise on Sales*, at p. 647, says: 'These three prohibited acts' (refer-

ring to engrossing and the kindred offenses of forestalling and regrating) 'are not only practiced every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy.' I must therefore conclude that long usage has brought about such a change in the common law since the decision in *The King v. Waddington*, that even if it could be said that the object of the parties to the agreement in question here was to enhance the price of salt, the contract would be neither illegal nor against public policy.

"Were I to hold this agreement void on any such ground, I should be laying down a rule which, if applied, would cause great inconvenience in trade, and one the necessity for which would at this day be discountenanced by all public and scientific opinion.

"I am far, however, from saying that if this doctrine of *The King v. Waddington* is still to be considered as law, it would reach such an agreement as this. I think a distinction would be found in the consideration that here the article the price of which was to be regulated was not to be purchased in the market, but was actually to be produced by the parties themselves, and this product they could not be compelled to part with except on their own terms. Then the object of the agreement was not unduly to enhance the price, but, as it is expressly alleged in the bill, to enable the parties by concerted action to combat an attempt on the part of foreign producers and manufacturers unduly to depreciate it. I

line in consideration of his discontinuing the running of his steamboats over the same route, and of his further agreeing to

know of no rule of law *ever* having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price—and nothing more than this has been agreed to by the parties here.

“The question then here is whether or not this agreement does do hurt to the public interest? The authority principally relied on by Mr. Crooks was the case of *Hilton v. Eckersley*, 6 E. & B. 47. There a bond entered into by the mill-owners of a certain district in Lancashire, conditioned to carry on their works in regard to wages, and the engaging of laborers and time of work, according to the resolutions of a majority, for a period of twelve months, was held void as being in undue restraint of trade, and so contrary to public policy. It is to be observed that in *Hilton v. Eckersley* each mill-owner completely surrendered his right of carrying on trade without restraint to the majority of the associates, who could at any moment they thought fit close the mills altogether. Before, however, pointing out how far short of the restraint imposed in *Hilton v. Eckersley* the present agreement falls, I will refer to some general observations of judges of high authority which show how carefully courts of justice ought to proceed in determining what is and what is not against public policy. In this same case of *Hilton v. Eckersley* we find Lord Campbell using this language: ‘I enter upon such considerations with much reluctance and with great apprehension when I think how different generations of judges and different judges of the same generation have differed in opinion upon questions of political economy and other

topics connected with the adjudication of such cases; and I cannot help thinking that where there is no illegality in bonds and other instruments at common law, it would have been better that our courts of justice had been required to give effect to them, unless where they are avoided by act of parliament.’”

“When one finds that Lord Campbell, notwithstanding these striking observations, decided that the obligors were not bound by their bond, it is impossible not to feel the force of the somewhat quaint illustration of Burrough, J., in *Richardson v. Mellish*, 2 Bing. at p. 252, where he says: ‘Public policy is an unruly horse, and when once you get astride it you never know where it will carry you.’

“Again, commenting on *Hilton v. Eckersley*, the editors of *Smith’s Leading Cases*, Mr. Justice Willes and Mr. Justice Keating, say (4th ed., vol. 1, p. 286): ‘The law upon this subject is, it must be confessed, in an unsatisfactory state, and there seems but too much ground to fear that, unless checked by a firm determination to uphold men’s acts when not in violation of some known rule of law, and to treat decided cases having a contrary tendency as exceptional, it may degenerate into the mere private discretion of the majority of the court as to a subject of all others most open to difference of opinion and most liable to be affected by changing circumstances.’ And in *Richardson v. Mellish*, already cited, Best, C. J., says: ‘I am not much disposed to yield to arguments of public policy. I think the courts of Westminster Hall have gone much further than they were warranted in doing on questions of policy. They have taken on themselves sometimes

neither sell nor charter his boats for use on the route, or to become in any way interested in competing steamships.¹

In this case a stockholder of the company paying the money brought suit to enjoin payment of the monthly sums and for the cancellation of the contract.²

to decide doubtful questions of policy, and they are always in danger in so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which enter into the judgments of those who decide on questions of policy. I admit that if it can be clearly put upon the contravention of public policy, the plaintiff cannot succeed; but it must be unquestionable—there must be no doubt.’

“I do not follow Mr. Crooks in his argument that the number of persons associated in this arrangement made a difference. It appears on the face of the bill that they are not all the salt producers in the province, and it also appears that salt, other than the produce of the wells of the plaintiffs and defendants, can be and is supplied to the public. This, being so, I think it makes no difference that this agreement was entered into by twenty persons engaged in the trade instead of only two.”

¹ *Leslie v. Lorillard et al.* (1888), 110 N. Y. 519, 18 N. E. R. 363.

² As regards the right of a stockholder to bring suit in such cases the court said:

“The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action. In the granting of charters the legislature is presumed to have had in view the public interest; and public policy is (as the interest of stockholders ought to be) concerned in the restriction of corporations within chartered limits, and a departure

therefrom is only deemed excusable when it cannot result in prejudice to the public or to the stockholders. As artificial creations they have no powers or faculties except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be: Is the act prohibited as prejudicial to some public interest, or is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of *ultra vires* should not prevail when it would not advance justice, but, on the contrary, would accomplish legal wrong.

“In suits between the corporation and strangers dealing with it the question is whether the act is one the corporation is not authorized to perform under any circumstances, or one that it may perform for some purposes or under certain conditions. In the first case it is *ultra vires* and there can be no recovery, because the party dealing with the corporation is bound to know, from the law of its existence, that it has no power to perform it. In the second case the issue will turn upon whether the party dealing with it is aware of the intention to perform the act for some unauthorized purpose, or whether the attendant circumstances justify its performance. In actions by stockholders which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it may be made to appear that the acts were fraudulent, or collusive and destructive of the

§ 248. In the course of the opinion the court laid down the following propositions:

1. Corporations are agencies for the promotion of the public convenience and for the development of public wealth, and, so long as they are conducted for the purposes for which organized, they are a public benefit.

2. In so far as agreements in restraint of trade tend beyond measures for self-protection, and threaten the public good in a distinctly appreciable manner, such agreements should not be sustained.

3. But the apprehension of danger to public interest should rest on evident grounds, and courts, in the exercise of equitable powers, should refrain from interfering with the conduct of the affairs of individuals or corporations unless such conduct, in some tangible form, threatens the welfare of the public.

4. No contracts are void as being in restraint of trade where they operate simply to prevent a party from engaging or competing in the same business.

5. An agreement the object of which is to remove a business rival whose competition is considered dangerous is not illegal where there is no attempt to exclude all competition in the business.

6. Such an agreement is not essentially different from the simple case of a sale by an individual of his business, together with his right to conduct it in some particular part of the country.¹

rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those intrusted with corporate management are largely discretionary. . . .

"We do not question the right of stockholders to complain of any diversion of the capital and assets to purposes not authorized by the charter and to arrest by suit an unauthorized course of dealing which results in such diversion. The powers of a court of equity may be put in motion at the instance of a single stockholder, if he can show that the corporation is employing its statutory powers for

the accomplishment of purposes not within the scope of its institution. Angell & Ames on Corporations, 393. But this is not such a case. The contracts were within the power of the corporation to make, and if they were free from the taint of fraud and were not procured to be made by some collusion or conspiracy, then they are binding upon the company and constitute an obligation which the officers must discharge."

¹ On the merits of the case the court said:

"Testing by these rules the case made by the plaintiff in his complaint, we find, in considering that

§ 249. Combination between steamship owners — Mogul Steamship Company case — England.— In this celebrated case certain firms of ship-owners trading between China and Europe, desiring to obtain for themselves a monopoly of the

pleading, that the only respect in which the contracts in question could be viewed as prejudicial to public interests, and therefore become the subject of judicial condemnation, as being against public policy, would be that they were in restraint of competition and tended to create a monopoly. The tendency of modern thought and of the decisions, however, has been no longer to uphold in its strictness the doctrine which formerly prevailed in respect of agreements in restraint of trade. The severity with which such agreements were at first treated became more and more relaxed by exceptions and qualifications. This change was gradual and may be considered, perhaps, as due mainly to the growth and spread of the industrial activities of the world, and to enlarged commercial facilities, which render such agreements less dangerous as tending to create monopolies. The earlier doctrine, of course, obtained in respect of agreements between individuals. The limitation which became imposed was, that the agreement should operate as to a locality and not as to the whole land. In later times the danger in such agreements seems only really to exist when corporations are parties to them, for their means and strength would better enable them to buy off rivalry and to create monopolies.

“The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor; it was to guard society, of which he was a member, from the injurious consequences of his agreement; whether they would arise

from his own improvidence in bargaining away his means of gaining a livelihood, or in the deprivation to society of the advantages of competition in skilled labor. At the present day there is not that danger, or at least it does not seem to exist to an appreciable extent, except, possibly, as suggested in the case of corporations. In their supervision and in their restriction within the limits of their chartered powers, the government and the public are directly interested. Corporations are great engines for the promotion of the public convenience and for the development of public wealth; and so long as they are conducted for the purposes for which organized they are a public benefit; but if allowed to engage, without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to that industry in which they are engaged, they become a public menace, against which public policy and statutes design protection.

“When, therefore, the provisions of agreements in restraint of competition tend beyond measures for self-protection and threaten the public good in a distinctly appreciable manner, they should not be sustained. The apprehension of danger to the public interests, however, should rest on evident grounds, and courts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations unless their conduct, in some tangible form, threatens the welfare of the public. The doctrine relating to contracts in restraint of

home-bound tea trade and to keep up the rate of freight thereon, formed themselves into an association and offered to all merchants and shippers in China, who shipped their tea exclusively in vessels belonging to members of the association, a rebate of five per cent. on freights paid. Other ship-owners who were not members of the association were excluded from the benefits of the association, and claimed in consequence of such exclusion to have sustained damages.¹

§ 250. The facts are recited as follows by Lord Watson in his opinion:² "The respondents are firms and companies owning steam vessels which ply regularly, during the whole year, some of them on the great river of China between Hankow and Shanghai, and others between Shanghai and European

trade has been elaborately discussed in a careful opinion of Andrews, J., in the recent case of the *Diamond Match Co. v. Roeber* (106 N. Y. 473). Under the authority of that case, it may be said that no contracts are void, as being in restraint of trade, where they operate simply to prevent a party from engaging or competing in the same business. It is there said (p. 483): 'To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privileges.'

"Under the doctrine of that case it is difficult to see how the contracts which are complained of here are open to the objection suggested by counsel. Regarded only in the light of what they tended to effect, these agreements removed a business rival whose competition may have been deemed dangerous to the success or maintenance of the business of the

Old Dominion Company. They could not, of course, exclude all competition in the business, but would in that particular case.

"How, then, is the result different from the simpler case of the sale by an individual of his business and his right to conduct it in a particular part of the land? The doctrine held by this court in *Diamond Match Co. v. Roeber*, *supra*, should control in the case at bar; and these contracts, therefore, cannot be considered objectionable on the ground that they restrained competition. Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil."

¹ For the many opinions in this celebrated case, which was finally affirmed in the House of Lords, see *Mogul S. S. Co. v. McGregor* (1885), L. R. 15 Q. B. D. 476, L. R. 21 Q. B. D. 544 (1888), L. R. 23 Q. B. D. 598 (1889), L. R. App. Cas. 25 (1892), 61 L. J. R. 295.

² L. R. App. Cas. (1892), 41.

ports. During the tea season, which begins in May and lasts about six weeks, most shippers prefer to have their tea sent direct from Hankow to Europe; but it suits the respondents' trade better to have the tea which they carry brought down to Shanghai by their ordinary river service, and then transhipped for Europe. Accordingly they do not send their ocean steamers up the river, except when they find it necessary in order to intercept cargoes which might otherwise have been shipped from Hankow in other than their vessels. The appellants are also a ship-owning company. They do not maintain a regular service either on the great river or between Europe and Hankow; but they send vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade, which appear, in ordinary circumstances, to have been considerable. The respondents entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the appellants and other outsiders from obtaining a share of the trade. The consequence of their acting upon the agreement was that the appellants, having sent their ships to Hankow, were unable to obtain cargoes at remunerative rates; and they claim as damages due to them by the respondents the difference between their actual annual earnings and the freights which their vessels might have earned had it not been for the combined action of the respondents."

§ 251. In their original statement of claim the plaintiffs alleged that they had suffered damage by reason of the defendants "conspiring together and with other persons at present unknown to the plaintiffs to prevent the plaintiffs from obtaining cargoes for steamers," etc. The gist of the charge was the conspiracy, and the plaintiffs proceeded to charge that the defendants in pursuance of the conspiracy "bribed, coerced and induced" shippers to forbear shipping cargoes by steamers owned by plaintiffs.

§ 252. The plaintiffs claimed: "(1) damages; (2) an injunction to restrain the defendants from continuing the wrongful acts hereinbefore mentioned."

The case was first heard before Lord Coleridge, C. J., and Fry, L. J., and they held that a confederation or conspiracy

by an associated body of ship-owners which is calculated to have and has the effect of driving the ships of other merchants or owners, and those of the plaintiffs in particular, out of a certain line of trade—even though the immediate and avowed object be not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and this country—is, or may be, an indictable offense, and therefore actionable, if private and particular damage can be shown. To warrant the court, however, in granting an *interim* or interlocutory injunction to restrain the parties from continuing to pursue the objectionable course, those who complain must at least show that they have sustained or will sustain “irreparable damage”—that is, damage for which they cannot obtain adequate compensation without the special interference of the court.¹

The motion for an interlocutory injunction was denied.²

¹ *Mogul Steamship Co. v. McGregor et al.* (1885), L. R. 15 Q. B. D. 476. In the course of the argument on behalf of the plaintiffs Fry, L. J., interjected this query: “The difficulty I feel is that we are asked to interfere to prevent the defendants from carrying on their trade in the manner they conceive to be the most beneficial to themselves, and this before trial of the action. Is there any authority for that, unless the circumstances are very exceptional? And, if this is an indictable offense, did the court of chancery ever interfere by injunction to restrain the commission of a crime?” Counsel for the plaintiffs replied that “direct authority was not to be expected.” In support of his contention generally he cited: *Rex v. Mawbey*, 6 T. R. 636; *Alderson, B.*, in *Hilton v. Eckersley*, 6 E. & B. 47; *Gregory v. Duke of Brunswick*, 6 M. & G. 205, 953; *O’Connell v. The Queen*, 11 Cl. & F. 155, 233; *The Queen v. Parnell*, “*The Times*” of Jan. 25, 26, 1881.

² Lord Coleridge stated the question immediately presented as follows: “It was an application on behalf of

the plaintiffs for an injunction to restrain the defendants from doing that which was called throughout the case,—and which I really see no reason for hesitating to call also,—boycotting the plaintiffs. It seems that a large number of important and rich ship-owners joined together, and they issued two circulars or documents (which may be treated substantially as one) to the different traders and their agents with whom they had been in the habit of dealing in the tea trade and other trades in China,—especially the former,—to the effect that, if the persons whom that circular reached, and was meant to affect, should deal with the plaintiffs or the plaintiffs’ ships, they, the defendants, would deny them all the benefits, or at least a very large and substantial benefit, which hitherto had accrued to them in their dealings with the defendants. The defendants, as they call themselves, and I prefer to use the name they call themselves, being a ‘conference’ of ship-owners, agreed that, if the persons to whom they addressed the circular would deal ex-

§ 253. Later the case came up before Lord Coleridge, C. J., without a jury, in an action for damages for the conspiracy.¹ Lord Coleridge rendered judgment for the defendants, holding:

1. "In order to found this action there must be an element of unlawfulness in the combination on which it is founded, and that this element of unlawfulness must exist alike whether the combination is the subject of an indictment or the subject of an action."

2. But whereas, under an indictment for criminal conspiracy, it is sufficient to show the existence of the unlawful combination — the combination, as distinguished from acts done in pursuance thereof, being the gist of the offense — in a civil action it is the damages which result from the unlawful combination which constitute the gist of the action, and not the combination itself. A combination may be unlawful and subject to indictment, but unless it inflicts some damage upon a party civil action will not lie. Any damage in this connection means legal injury; mere loss or disadvantage will not sustain the action.

3. Or, to restate the last proposition, "If the combination is unlawful, then the parties to it commit a misdemeanor, and are offenders against the state; and if, as the result of such unlawful combination and misdemeanor, a private person receives

clusively with them, they should have certain advantages at their hands; and that, if they did not deal exclusively with them, but should even to the extent of a very small portion of cargo deal with any other ship-owner, they should lose all the advantages which otherwise they would derive from dealing with the defendants. That is, undoubtedly, what the defendants have done; and the plaintiffs allege that the result as far as it concerns them has been and will be to drive them out of the China market, and render it impossible for them to run their line of steamers at remunerative rates. In short, the plaintiffs contend that this is a combination or conspiracy on the part of the conference to exclude from the China market the ships of

the plaintiffs; and that it is done for the purpose of injuring them; and that it is against public policy, inasmuch as it is an undue interference with trade,—even though it should work no injury to the plaintiffs. I do not at this moment attempt to deal with the counter-statement of the case on the part of the defendants. I do not forget it; and I do not at all suggest that it is not weighty and important; but for the moment I pass it by, and I assume for the purpose of this decision that the plaintiffs could establish substantially what I have stated, and that there is no case that could prevail against it."

¹ See *Mogul S. S. Co. v. McGregor et al.* (1888), L. R. 21 Q. B. D. 544.

a private injury, that gives such person a right of private action."¹

§ 254. Parties engaged in trade have the right to push their trade by all lawful means, and to endeavor by all lawful means

¹ Reciting the contentions of the parties, Lord Coleridge said: "The complaint then, is this: that the defendants unlawfully combined or conspired to prevent the plaintiffs from carrying on their trade; that they did prevent them by the use of unlawful means in furtherance of such unlawful combination or conspiracy, and that from such unlawful combination or conspiracy, therefore, damage has resulted to the plaintiffs. The defendants answer that neither was their combination unlawful in itself, nor were any unlawful means used in furtherance of it; but that the damage, if any, to the plaintiffs was the necessary and inevitable result of the defendants carrying on their lawful trade in a lawful manner. These are the contentions on the two sides."

And referring to the propositions of law summarized in the text, the learned chief justice said:

"If this statement of the law, clear, as I hope, be also accurate, as I believe, there is no need to enter into the historical inquiry as to how the action on the case in the nature of a conspiracy grew out of the old, and for many years disused, writ of conspiracy, which was very limited in its operation, and the judgment in which was followed by very terrible consequences. Those who desire to follow out an interesting but otiose inquiry, may find all the material for it in Fitzherbert, *de Natura Brevium*, at page 260 of the edition of 1730, enriched with Lord Hale's notes, and in the judgment of Lord Holt in *Saville v. Roberts*, reported in various books, but best and most fully in 1 Lord Raymond, p. 374, and very well in

Carthew, p. 416, where especially the distinction between the ordinary judgment in an action on the case and a villainous judgment, as explained in Jacob's and Tomlins' Dictionaries, is pointed out and insisted on. The whole law on this subject may be found in a most convenient form in the notes to *Hutchins v. Hutchins*, 7 Hill (N. Y.), 104, a case decided in the supreme court of the state of New York in 1845, and published by Mr. Melville Bigelow in his very valuable collection of *Leading Cases on the Law of Torts*, at p. 207. (I cite from the Boston edition of 1875.) The first paragraph of the judgment of Nelson, C. J., in that case contains an admirable statement of the law; and Buller's *Nisi Prius*, pp. 13a and 14, and Selwyn's *Nisi Prius*, p. 1062, may be usefully referred to, and the note to *Skinner v. Gunton*, 1 Wins. Saund. ed. (1845), p. 229, and *Termes de la Ley*, title Conspiracy."

After reviewing a number of these cases he continues: "I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who has suffered injury from them. The question comes at last to this: What was the character of these acts, and what was the motive of the defendants in doing them? The defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavor by lawful

to keep their trade in their own hands and exclude others from participating therein. It is lawful to make profitable offers to attract customers from competitors, and they may induce customers to deal with them exclusively by giving notice that to such exclusive customers only will they give the benefit of their more favorable terms.¹

§ 255. The agreement in this case was not unlawful as in restraint of trade. Restraint of trade has in its legal sense nothing to do with the controversy in the case before the court.²

§ 256. It is not disputed that a wrongful and malicious combination to ruin a man in his trade may be ground for an action for damages sustained; but the fact that the parties to the combination were determined, if they could, to exclude the plaintiffs from the trade in question, is not sufficient to establish a wrongful and malicious combination.

§ 257. All trade is and must be in itself selfish; the amount of any particular trade being limited, what one man gains another loses; and under the facts as recited, the parties to the combination did not cross the line which separates the reasonable and legitimate selfishness of traders from wrong and malice.³

means to keep their trade in their own hands and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. Of coercion, or bribing,

I see no evidence; of inducing, in the sense in which that word is used in the class of cases to which *Lumley v. Gye*, 2 E. & B. 216, belongs, I see none either."

¹ See L. R. 21 Q. B. D. 552.

² "One word in passing only on the contention that this combination of the defendants was unlawful because it was in restraint of trade: It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent. off their bills at Christmas on condition of their customers dealing with them and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question."

³ See L. R. 21 Q. B. D. 553, 554, where Lord Coleridge concludes his decision with these general observations:

"But it is said that the motive of

§ 258. The case was heard in the court of appeal¹ before Lord Esher, Master of the Rolls, Bowen, L. J., and Fry, L. J. Lord Esher was of the opinion that the appeal should be allowed, holding: "First, that the head of law which we are

these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that if damage has resulted to the plaintiffs an action will lie. I concede that if the premises are established the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this. Was, then, this combination such? The answer to this question has given me much trouble, and I confess to the weakness of having long doubted and hesitated before I could make up my mind. There can be no doubt that the defendants were determined, if they could, to exclude the plaintiffs from this trade. Strong expressions were drawn from some of them in cross-examination, and the telegrams and letters showed the importance they attached to the matter, their resolute purpose to exclude the plaintiffs if they could, and to do so without any consideration for the results to the plaintiffs, if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand-to-hand war of commerce, as in the conflicts of public life, whether at the bar, in parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or to defeat

them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference; in 1885 they excluded them, and they were determined, no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill will to the plaintiffs as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it, they thought, and honestly, and as it turns out correctly, that for a time at least there would be an end of their gains.

"The plaintiffs' conduct cannot affect their right of action, if they have it; but it is impossible not to observe that they were as reckless of consequences in regard to the defendants as they accuse the defendants of being in regard to themselves; they were as determined to break in as the defendants were determined to shut out; and they made their threats of smashing freights and injuring the defendants—a mode of rather forcible suasion to the defend-

¹ See L. R. 23 Q. B. D. 598, 609 (1889).

considering applies only to trade and to traders; second, that the law has a peculiar care for the preservation of a free course of trade as between traders, because such freedom is for the benefit of the public; third, that the principal formula of law for the purpose of enforcing this peculiar care is that every trader has a legal right to a free course of trade, meaning thereby a legal right to be left free to exercise his trade according to his own will and judgment; fourth, that if any one, by an act wrongful as against that right, interferes with it to the injury of a trader, an action lies against such person by such trader; fifth, that any act of fair trade competition, though it injure a rival trader even to the destruction of his trade, is not a wrongful act as against such rival trader's right, but is only the exercise of the first-mentioned trader's equal right, and is therefore not actionable; sixth, any act, though of the nature of competition in trade, but which is an act beyond the limits of fair trade competition, and which is therefore not an act of any real course of trade at all, and the immediate and necessary effect of which is such an interference with a rival trader's right to a free course of trade as prevents him from exercising his full right to a free course of trade, leads to an almost irresistible inference of an indirect motive, and is therefore — unless, as may be possible, the motive is negatived — a wrongful act as against his right, and is actionable if injury ensue; seventh, an act of competition, otherwise unobjectionable, done for the purpose of competition, but with the intent to injure a rival trader in his trade, is not an act done in an ordinary course of trade, and therefore is actionable if injury ensue; eighth, an agreement among two or more traders, who are not and do not intend to be partners, but where each is to carry on his trade according to his own will, except as regards the agreed act, that agreed act being one to be done for the purpose of interfering, *i. e.*, with intent to interfere with the trade of another,

ants to let them into the conference. If they have their right of action, why they have it; if they have it not, their own conduct disentitles them to much sympathy.

"On the whole I come to the conclusion that the combination was not wrongful and malicious, and

that the defendants were not guilty of a misdemeanor. I think that the acts done in pursuance of the combination were not unlawful, not wrongful, not malicious; and that therefore the defendants are entitled to my judgment."

is a thing not done in the due course of trade, and is therefore an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders, and is therefore a wrongful act against such trader, and, if it is carried out and injury ensue, is actionable; ninth, such an agreement, being a public wrong, is also of itself an illegal conspiracy, and is indictable."

§ 259. Lord Esher, however, was overruled by Justices Bowen and Fry, who laid down the following general principles. Referring to the proposition that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade, Bowen, L. J., said:

§ 260. "Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right."

§ 261. Again, referring to the nature of an actionable wrong, the same justice said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong.¹ The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely, in the mode and manner that best

¹ See *Bromage v. Prosser*, 4 B. & v. Henty, per Lord Blackburn, 7 App. C. 247; *Capital and Counties Bank Cases*, 741, at p. 772.

suits them, and which they think best calculated to secure their own advantage.”

§ 262. The following general propositions were laid down:

1. The law recognizes the right of a trader to trade freely; but no man, whether he is a trader or not, can justify the damage of another in business by fraud or misrepresentation.

2. Intimidation, obstruction and molestation are forbidden; so also is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for such procurement.

3. The intentional driving away of customers by show of violence, and the inducing of persons under personal contracts to break their contracts, are instances of illegal acts.¹

¹The court continued: “What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton v. M’Gawley*, Peake, N. P. C. 270; the obstruction of actors on the stage by preconcerted hissing: *Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 Man. & G. 205; the disturbance of wild fowl in decoys by the firing of guns: *Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, 11 East, 574, n.;

the impeding or threatening servants or workmen: *Garrett v. Taylor*, Cro. Jac. 567; the inducing persons under personal contracts to break their contracts: *Bowen v. Hall*, 6 Q. B. D. 333; *Lumley v. Gye*, 2 E. & B. 216,—all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendant’s ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs’ share. I can find no authority for the doctrine that such a commercial motive deprives of ‘just cause or excuse’ acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-

4. It is legitimate to combine capital for all purposes of trade for which capital may, apart from combination, be legitimately used in trade.

5. Competition, however severe, if unattended by circum-

advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been 'unfair.' This seems to assume that, apart from fraud, intimidation, molestation or obstruction, of some other personal right *in rem* or *in personam*, there is some natural standard of 'fairness or reasonableness' (to be determined by the internal consciousness of judges and jurors) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason, for such a proposition. It would impose a novel fetter upon trade.

"It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be

no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy (see *Skinner v. Gunton*, 1 Wms. Saund. Ed. 229; *Hutchins v. Hutchins*, 7 Hill's New York Cases, 104; *Bigelow's Leading Cases on Torts*, 207). But what is the definition of an illegal contract? It is an agreement by one or more to do a lawful act by unlawful means (*O'Connell v. The Queen*, 11 Cl. & F. 155; *Reg. v. Parnell*, 14 Cox, Crim. Cases, 508); and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or

stances of dishonesty, intimidation, molestation or other illegal conduct, gives rise to no cause of action at common law.

6. Whenever persons enter into an agreement which constitutes at law an indictable conspiracy, and that agreement is

excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only difference that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to the bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited is a problem which might well puzzle a casuist. The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm

him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity (see *Rex v. Waddington*, 1 East, 143); to combine to purchase all the shares of a company against a coming settling day; or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match-vendors combine to sell matches below their value in order to drive a third match-vendor from the street?

“Lastly, we are asked to hold the

carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators.¹

7. The right to trade is not absolute, but is qualified by the right enjoyed by others to compete for the same trade.

8. Competition exists when two or more persons seek to possess or enjoy the same thing; the success of one must necessarily mean the failure of the other, and there is no principle of law which enables courts to interfere with, or moderate, either the success or the failure, so long as it is due to mere competition — fraud, intimidation or oppression not being involved.

9. Inasmuch as it is legal for one man by competition to strive to drive his rival out of the field, it is lawful for two or

defendants' conference or association illegal, as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in *Hilton v. Eckersley*, 6 E. & B. 47, is, I think, not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decision in *Cousins v. Smith*, 13 Ves. 542, is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his *Lives of the Chancellors*. If, indeed, it could be plainly proved that the mere formation of 'conferences,' 'trusts' or 'associations' such as these were always necessarily injurious to the public,— a view which

involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron regime of statutory monopolies, such confederations can ever be really successful,— and if the evil of them were not sufficiently dealt with by the common-law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions is, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law."

¹This proposition and the following general propositions are condensed in the opinion of Fry, L. J., rendered on the same appeal. See L. R. 23 Q. B. D. 624-632.

more to combine to the same end, providing the means to be used are only such as the individual could use, namely, lawful means.

10. The stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus, necessarily, to interfere with what would have been the course of trade if unaffected by such combinations.¹

¹The opinion of Fry, L. J., has been so often referred to that we are warranted in quoting from it somewhat at length:

"If every agreement in restraint of trade were not only void but unlawful in the stricter sense of the word, it would follow that, as every agreement must be between at least two persons, every such agreement would constitute an indictable offense; and yet not a single case has been cited of a conspiracy constituted by a mere agreement between two persons in undue restraint of the trade of one of the contractors. This silence of the books is very significant.

"It was forcibly urged upon us that combinations like the present are in their nature calculated to interfere with the course of trade, and that they are, therefore, so directly opposed to the interest which the state has in freedom of trade, and in that competition which is said to be the life of trade, that they must be indictable. It is plain that the intention and object of the combination before us is to check competition; but the means it uses is competition, and it is difficult, if not impossible, to weigh against one another the probabilities of the employment of competition on the one hand and its suppression on the other; nor is it easy to say how far the success of the combination would arouse in others the desire to share in its benefits, and by competition to force a way into the magic

circle. In *Wickens v. Evans*, 8 Y. & J. 318, it was suggested that the brewers or distillers of London might enter into an agreement to divide the metropolis into districts, the effect of which might be to supply the public with an inferior commodity at a higher price. This argument was met by Hullock, B., by this observation: 'If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would perhaps be that the public would obtain the articles they deal in at a cheaper rate.' A similar observation may be made in the present instance, and corroborated by what has actually happened. For the case before us strikingly illustrates the difficulty of foretelling the probable results of such a combination on the public interest; in fact the competition between the plaintiffs and the defendants in May and June, 1885, brought down the freights from Hankow, to the benefit, it must be supposed, of the consumer in England. The conference came to an end in August, 1885, and in the summer of 1886 the rate of freight from Hankow was determined by free competition in an open market in which the defendants were competing with one another.

"But I do not rest my conclusion on any speculations as to the probable effect of such agreements to the

11. None of the cases appears to support the proposition that mere competition of one set of men against another man carried on for the purpose of gain and not out of actual malice is actionable, even though intended to drive the rival in trade

one before us, but on this: that the combination, if in restraint of trade, is *prima facie* void only and not illegal; that no statute in force makes such competition criminal; and that the policy of our law, as at present declared by the legislature, is against all fetters on combination and competition unaccompanied by violence or fraud, or other like injurious acts."

Referring to the common law and the history of the law relating to forestalling and kindred offenses, the court says: "The ancient common law of this country and the statutes with reference to the acts known as badgering, forestalling, regrating, and engrossing, indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public; they were held criminal accordingly. But early in the reign of George III. the mind of the legislature showed symptoms of change in this matter, and the penal statutes were repealed (12 Geo. III., ch. 71), and the common law was left to its unaided operation. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle and sundry other sorts of victuals, by preventing a free trade in the commodities, had a tendency to discourage the growth and to enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future.

"This new policy has been more clearly declared and acted upon in the present reign; for the legislature has by 7 & 8 Vict., ch. 24, altered the common law by utterly abolishing the several offenses of badgering, forestalling and regrating. At the same time this repeal was accompanied by a proviso that nothing in the act contained should apply to the offense of knowingly and fraudulently spreading or conspiring to spread any false rumor with intent to enhance or decry the price of any goods or merchandise, or to the offense of preventing or endeavoring to prevent by force or threats any goods, wares or merchandise being brought to any fair or market, but that every such offense might be punished as if this act had not been made. The comparison of the operative part of this statute with this proviso goes far to draw the line between lawful and unlawful interference with the ordinary course of trade or of the market. A consideration of the statutes relative to trade unions leads me to a similar conclusion. It is not necessary to consider in detail the provisions of the statutes of 1871 and 1875 (34 & 35 Vict., ch. 31, and 39 & 40 Vict., ch. 22); but one of their principal results was to enlarge the power of combination between workmen and workmen, and between masters and masters, for the purpose of maintaining and enforcing their respective interests, and to remove the objection of being in restraint of trade, to which some of such combinations had been obnoxious. But whilst the legislature thus set masters and men respectively

away from his place of business, and though that intention be actually carried into effect.

§ 263. And the majority of the court of appeal found, as a matter of fact, that the defendants were not engaged in a conspiracy or unlawful combination, that they were not actuated by malice or ill will towards plaintiffs and did not aim at any general injury to plaintiffs' trade, the object being simply to divert the trade from the plaintiffs to defendants; the damage to be inflicted was to be strictly limited by the gain which defendants desired to win to themselves.

§ 264. The case was carried to the House of Lords,¹ and was there affirmed without dissent.²

free to combine, they reasserted the illegality of using violence, threats, molestation, obstruction or coercion; and here again the contrast between the two pieces of legislation which stand side by side in the statute-book, the one declaring mere combinations lawful, and the other declaring violence and other like acts unlawful, helps to draw the line in the same direction as does the legislation in respect of trade combination. See the statutes 34 & 35 Vict., ch. 31 and ch. 32.

"Thus the stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade and intended to govern or regulate the proceedings of large bodies of men, and thus, necessarily, to interfere with what would have been the course of trade if unaffected by such combinations. I therefore conclude that the combination in the present case cannot be held illegal, as opposed to the policy of the law."

¹ *Mogul Steamship Co. v. McGregor et al.* (1891), 61 L. J. R. 295.

² In the course of his opinion Lord Watson said: "I have never seen any reason to suppose that the parties to the agreement had any other object in view than that of defending their

carrying trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants, great and small, in every branch of commerce, and it is in the eye of the law perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main and ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your lordships. But no such case is presented by the facts disclosed in this appeal. I cannot for a moment suppose that it is the proper function of English courts of law to fix the lowest prices at which traders can sell or hire for the purpose of protecting or extending their business without committing legal wrong which may subject them in damages. Until that becomes the law of the land, it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks

§ 265. Lord Bramwell said: "There is one thing that is to me decisive: I have always said that a combination of workmen, an agreement among them to cease work except for higher wages and a strike in consequence, was lawful at common law. Perhaps not enforceable, *inter se*, but not indictable; the legislature has now so declared. The enactment is express that agreements among workmen shall be binding, whether they would or would not but for the acts have been deemed unlawful as in restraint of trade. Is it supposable that it would have done so in the way it has, had the workmen's combination been a punishable misdemeanor? Impossible. This seems to me conclusive that, though agreements which fetter the freedom of action in the parties to it may not be enforceable, they are not indictable. See also the judgment of Lord Justice Fry on this point. Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops, sufficient for the wants of the neighborhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offense? Remember, the conspiracy is the offense, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action?"

§ 266. Lord Morris said: "The facts of this case demonstrate that the defendants had no other or further object than to appropriate the trade of the plaintiffs. The means used were, first, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete with the plaintiffs' ships; thirdly, the lowering of the freights; fourthly, the indemnifying other vessels that would compete with the plaintiffs; fifthly, the dismissal of agents who were acting for them and the plaintiffs.

fit to part with his goods or to accept employment. The withdrawal of agency first appeared to me to be a matter attended with difficulty, but, on consideration, I am satisfied that it cannot be regarded as an illegal act. In the first place it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and in the second place the respondents gave the agents the option of continuing to act for one or other of them, in circumstances which placed the appellants at no disadvantage."

“The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he used be lawful weapons. Of the first four of the means used by the defendants the rebate to customers and the lowering of the freights are the same in principle, being a bonus by the defendants to customers to come and deal exclusively with them. The sending of ships to compete, and the indemnifying other ships, was ‘the competition’ entered on by the defendants with the plaintiffs. The fifth means used — namely, the dismissal of agents — might be questionable according to the circumstances; but in the present case the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants. Dismissal under such circumstances became perhaps a necessary incident of the warfare in trade.

“All the acts done and the means used by the defendants were acts of competition for the trade. There was nothing in the defendants’ acts to disturb any existing contract of the plaintiffs, or to induce any one to break such. Their action was aimed at making it unlikely that any one would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them. The use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it.

“Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists combining together could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure, the trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means. And the defendants’ case clearly comes within the principle I have stated.

“Now, as to the contention that the combination was in restraint of trade and therefore illegal. In the first place, was it in restraint of trade? It was a voluntary combination. It

was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise.

"I cannot see why judges should be considered specially gifted with the prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world, competition is the life of trade, and I am not aware of any stage of competition called 'fair,' intermediate between lawful and unlawful. The question of 'fairness' would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another."¹

¹ In the course of his opinion Lord Field, after reviewing the circumstances of the case and the authorities, said: "It follows, therefore, and is undoubted law, not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action. Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights. No doubt, also, there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspir-

acy, the ultimate object or the means being unlawful, although if done by an individual no such consequence would follow. But I think that in all such cases it will be found that there existed either an ultimate object of malice or wrong, or wrongful means of execution involving elements of injury to the public, or at least negating the pursuit of a lawful object.

"Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bona fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its object of harm. All the acts complained of were in themselves law-

ful, and if they caused loss to the appellants that was one of the necessary results of competition. It remains to consider the further contention of the appellants that these acts of respondents, even if lawful in themselves if done by an individual, are illegal and give rise to an action as having been done in the execution of the conference agreement, which is said to amount to a conspiracy, as being in restraint of trade, and so against public policy and illegal; but this contention, I think, also fails. I cannot say upon the evidence that the agreement in question was calculated to have, or had, any such result; nor even if it had, has any authority (except one, no doubt entitled to great weight, but which has not met with general approval) been cited to show that such an agreement, even if void, is illegal; nor even that, even if it be so, an action lies by an individual."

And Lord Hannen said: "The question, however, raised for our consideration in this case is whether a person who has suffered loss in his business by the joint action of those who have entered into such agreement can recover damages from them for the injury so sustained. In considering this question it is necessary to determine upon the evidence what was the object of the agreement between the defendants, and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain ports. It cannot, I think, be reasonably suggested that this is unlawful in any sense of the word. The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can. If, then, the object of the defendants was legitimate, were the means adopted by

them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals."

Continuing he said: "It only remains for me to refer to the argument that an act which might be lawful for one to do becomes criminal or the subject of civil action by any one injured by it if done by several combining together. On this point I think the law is accurately stated by Sir W. Erle in his *Treatise on the Law Relating to Trade Unions*. The principle he lays down is equally applicable to combinations other than those of trade unions. He says (p. 28): 'As to combination, each person has a right to choose whether he will labor or not; and also to choose the terms on which he will consent to labor, if labor be his choice. The power of choice in respect of labor and terms which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ, unless upon terms allowed by the combination.'

"In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a com-

§ 271. Combination by consolidation of competing companies, by the formation of a new corporation to take over the assets of the competing companies, the object being to diminish competition, is legal.¹

§ 272. Combination among individuals by the formation of a partnership to handle produce or merchandise and control competition in a given market is legal where no fraud or deception is practiced.²

§ 273. Combination of competing gas companies by one company purchasing the stock and bonds of a rival company is legal, the purpose of the combination to secure itself against ruinous competition being held a "lawful purpose" under the laws of New York.³

§ 274. Combination of competing companies by agreement intended to avoid competition and control the price of a product which, though valuable, is not of prime necessity, is legal.⁴

§ 275. Combination by voluntary association, establishing uniform prices or charges and prohibiting discounts therefrom, is legal in the absence of evidence to show that association controlled the business or that the schedule of prices was unreasonable.⁵

§ 276. Combinations among competitors, the object of which is to realize a fair price for the goods manufactured and sold, do not contravene any rule of public policy, even though they operate in some respects as in restraint of trade.⁶

N. H. 100, 127, 20 Atl. R. 383, 9 L. R. A. 689, 47 Am. & Eng. R. R. Cas. 359; Koehler v. Feuerbacher et al. (1876), 2 Mo. App. 11; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. R. 629; Dolph v. Troy Laundry Machinery Co. (1886), 28 Fed. R. 553; Sayre v. Louisville U. Ben. Ass'n (1863), 62 Ky. 143; Trenton Potteries Co. v. Olyphant et al. (1899), 43 Atl. R. 723; Ontario Salt Co. v. Merchants' Salt Co. (1871), 18 Grant's Ch. R. 540.

¹ Oakdale Mfg. Co. et al. v. Garst (1894), 18 R. I. 484, 28 Atl. R. 973; Trenton Potteries Co. v. Olyphant (1899), 43 Atl. R. 723.

² Fairbank et al. v. Leary (1878), 40 Wis. 637; Live-Stock Ass'n v. Levy, 54 N. Y. Sup. Ct. 32.

³ Rafferty et al. v. Buffalo City Gas Co. (1899), 37 App. Div. 618; Oakes v. C. W. Co., 143 N. Y. 480, 88 N. E. R. 481.

⁴ Gloucester Isinglass & Glue Co. v. Russia Cement Co. (1891), 154 Mass. 92, 27 N. E. R. 1005.

⁵ Herriman et al. v. Menzies (1896), 115 Cal. 16, 35 L. R. A. 318.

⁶ Cohen v. Berlin & Jones Envelope Co. et al. (1899), 56 N. Y. Supp. 588; People v. Sheldon, 139 N. Y. 251, 34 N. E. R. 785; Leslie v. Lorillard, 110 N. Y. 519, 531, 18 N. E. R. 363; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. R. 419; Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 42 N. E. R. 403; Drake v. Siebold, 81 Hun, 178, 30 N. Y. S. 697; Matthews v. Asso-

§ 277. Combination of all competitors to control trade and prices by formation of new corporation to take entire product and act as exclusive selling agent is legal, the article — curtain shade rollers — not being of prime necessity.¹

§ 278. Combination by voluntary association among competitors for the purpose of suppressing ruinous competition and establishing better prices through the appointment of an exclusive selling agent and a supervisory committee, held legal.²

§ 279. Combination of two competitors by formation of a partnership, whereby one discontinued his business for a specified time, held legal as not amounting to a conspiracy, and the machinery — laundry machinery — not being articles of necessity.³

§ 280. Combination to prevent competition by subsidizing competitor is legal.⁴

§ 281. Combination to suppress competition by means of contracts with independent manufacturers for their entire products is not illegal so long as there is not a conspiracy to monopolize the market.⁵

§ 282. Combination of workmen for protection and to increase wages is legal; so also is the combination of common carriers to guard against undue competition and the reducing of freights below a fair compensation.⁶

§ 283. Combination of ocean carriers to keep up freight rates, hold trade and discourage competition is legal unless conspiracy to maliciously ruin trade of competitors is shown.⁷

§ 284. Fraud and the malicious oppression of others illegal.—In most of the decisions sustaining combinations the

ciated Press, 136 N. Y. 333, 340, 32 N. E. R. 981; *M. & L. R. Co. v. Concord Ry. Co.*, 66 N. H. 100, 127, 20 Atl. R. 383, 9 L. R. A. 689, 27 Atl. R. 283, 47 Am. & Eng. Ry. Cas. 359; *Morawetz on Corp.* (2d ed.) 1131; *Koehler v. Feuerbacher et al.* (1876), 2 Mo. App. 11.

¹ *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. R. 629.

² *Skrainka v. Scharringhausen* (1880), 8 Mo. App. 522; *Ontario Salt Co. v. Merchants' Salt Co.* (1871), 18 Grant's Ch. 540.

³ *Dolph v. Troy Laundry Machinery Co.* (1886), 28 Fed. R. 533.

⁴ *Leslie v. Lorillard et al.*, 110 N. Y. 519, 18 N. E. R. 363.

⁵ *Carter-Crume Co. v. Peurrung* (1898), 86 Fed. R. 439.

⁶ Excepting, of course, in the case of common carriers, where federal or state statutes control rates, combinations and agreements. *Sayre v. Louisville U. Ben. Ass'n* (1863), 62 Ky. 143.

⁷ *Mogul Steamship Co. v. McGregor et al.* (1885), L. R. 15 Q. B. D. 476.

courts are very careful to point out that if it should appear that the object of a combination is to defraud or maliciously injure or oppress others, such object would render the combination illegal, as amounting to a conspiracy.¹

§ 285. In the *Mogul Steamship Case* the foundation of the action was the charge that the defendants conspired together to injure plaintiffs, and in the various opinions in this celebrated case the questions of fraud, malice and oppression were discussed more fully than in any other reported case.²

§ 286. To render a combination unlawful because its object is to defraud, maliciously injure or oppress others, this element of unlawfulness must appear in the agreement constituting the combination.³ It must clearly appear that the combination was organized for the express or implied purpose of defrauding, maliciously injuring or oppressing others. The wrongful intent must be present. If the combination is organized for legitimate purposes it is legal even though it may, in the prosecution of its legitimate objects, incidentally injure and even ruin others. If it appears that injury to others was not one of the objects of the combination, but was simply an incidental result, the combination is legal. The distinction is drawn by Chief Justice Coleridge in the *Mogul Steamship Case* as follows: "I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who has suffered injury from them. The question comes at last to this: What was the character of these acts, and what was the motive of the defendants in doing them? The defendants are traders, with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavor by lawful means to keep their trade in their own hands, and by the same means to exclude others from its benefits if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavor to induce customers

¹ See §§ 233 and note, 248 and note, and 262, *supra*.

² See §§ 249 to 266, *supra*.

³ See § 253, *supra*.

to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. Of coercion, of bribing, I see no evidence."¹

§ 287. Aside from the question of fraud, malice and oppression, the right of individuals, partnerships and corporations to consolidate and combine to further their interests is sustained upon the general principles hereinbefore laid down at length, except, of course, where limited by statutory provisions.²

§ 288. **Combinations presumed legal.**—A court will not assume that the purpose and effect of a combination are to unduly raise the prices of the commodity produced, but such purpose must be shown affirmatively.³

§ 289. The law will not presume an agreement to be void as against public policy when it is susceptible of a construction which would make it legal.⁴

§ 290. The invalidity of agreements providing for such combinations is never to be inferred, but must be made to appear clearly.⁵

§ 291. **Injury to the public must clearly appear.**—Where it is claimed that a combination is inimical to public interest, the apprehension of danger should rest on evident grounds. Courts, in the exercise of equitable powers, should refrain from interfering with the conduct of the affairs of individuals or corporations unless such conduct in some tangible form threatens the welfare of the public.⁶

§ 292. **Combinations controlling necessities of life.**—In a number of cases wherein the validity of combinations has been

¹ See also § 262, *supra*.

² See §§ 189 to 208, *supra*.

³ *Central Shade Roller Co. v. Cushman* (1887), 148 Mass. 353, 9 N. E. R. 629.

⁴ *Live-Stock Ass'n v. Levy*, 54 N. Y. Sup. Ct. 32.

⁵ *Herriman et al. v. Menzies et al.* (1898), 115 Cal. 16, 35 L. R. A. 318.

⁶ *Leslie v. Lorillard et al.* (1888), 110 N. Y. 519, 18 N. E. R. 363.

before the courts, the courts have considered whether or not the product controlled by the combination is or is not a necessary of life. For instance, in sustaining one combination it was held that zinc was not a necessary of life.¹ And again, that laundry machinery, although articles of convenience, were not articles of necessity.² In so far as these decisions turn upon the question whether or not the products in question were necessities of life, they rest upon exploded notions. The old statutory offenses of regrating, forestalling and engrossing depended entirely upon the question whether or not the products were necessities of life within the meaning of the statute. With the repeal of the ancient law and the disappearance of these offenses, the question whether or not a given product controlled by a combination or an individual is a necessary of life ceases to have any practical bearing. It would be difficult, indeed, nowadays to say what are and what are not necessities of life. The luxuries of one generation are the comforts of the next and the necessities of the third. If the legality of a combination were to turn upon the question whether its product is a necessary of life, there are few combinations which would not be held — and very properly held — illegal, as attempting to control some article or product essential to the well-being of mankind. A conspiracy to injure others may be just as disastrous to the few affected in the perfumery trade as in the flour trade; and whether a conspiracy in one trade is as injurious as a conspiracy in another is not the question which determines the legality or illegality of the combination. The extent of the injury affects the amount of the damages in an action at law; but whether the damages be large or small, and whether the number affected be many or few, the character of the combination, whether a conspiracy or not, is determined by considerations entirely aside from the extent of the damage inflicted.

§ 293. Some conclusions restated in the light of the decisions.—In the light of the decisions sustaining combinations it will be of interest to restate certain propositions heretofore outlined and indicated.

¹ Meredith et al. v. Zinc & Iron Co. (1897), 35 N. J. Eq. 212, 37 Atl. R. 539. ² Dolph v. Troy Laundry Machinery Co. (1886), 28 Fed. R. 553.

Combinations of two or more for purposes of profit ordinarily take one of the following forms:

(a) Partnerships.

(b) Corporations.

(c) Consolidations of partnerships or corporations by amalgamation or absorption, usually by one competitor buying up others, or the organization of a new partnership or corporation to buy up a number of others.

(d) Voluntary associations to promote or control trade.¹

§ 294. And it appears from the cases cited that each of these different forms of combination has been repeatedly sanctioned by the courts, and most of them are, or have been at different times, authorized by statute.

§ 295. It is apparent, then, that the test of the legality of any combination does not lie in its form. It may be a partnership, a corporation, a consolidation, or a voluntary association, and be perfectly legal. The form of the combination is not only no test of legality, but it is no evidence, not even an indication, of legality or illegality. So far as any given form is concerned, whether a partnership, a corporation, a consolidation, or a voluntary association, courts must attach to it that presumption of legality and good faith which attaches to all contracts and transactions not illegal on their face.

§ 296. The fact that any of these forms of combination may be used to cloak a conspiracy does not affect the presumption of legality which is the right of each.

§ 297. The test of the validity of any combination is found in the purposes for which it was organized; neither the form of the combination nor the number of those entering into it is any test of its validity. But the purposes may be disclosed in the articles or charter, and the number and *personnel* of those entering into the combination in connection with the circumstances may in some cases throw light upon the character of the combination.

¹Combination by the pooling or trusteeing of stocks of competing corporations we are leaving for subsequent consideration; it is the "trust" proper and is a modern device of doubtful utility and still more doubtful legality — as the courts have held.

The law of the "trust" will receive due consideration in its proper place; but since the "trust" is a form of combination now little resorted to, the investigation will have an historical rather than a practical interest.

§ 298. Monopoly, suppression of competition, restraint of trade.—The legality of combinations is ordinarily challenged upon the grounds that:

1. They tend to create a monopoly.
2. They tend to suppress competition.
3. They tend to restrain trade.

§ 299. Monopoly.—The law of monopoly and its application to modern combinations has been already fully discussed. (See Part I.) The odium which attaches to the term on account of its origin and early associations is made to do heroic service in the popular discussion of modern combinations, though in reality the early law and prejudice against monopolies have no application whatsoever.

§ 300. A modern combination, whether a partnership, a corporation, or a large combination, is not illegal because it may possess a monopoly of the trade in its line. Monopoly is not a test of legality. It is obvious that the significance of the term is largely relative. In its absolute sense it means the control of a given product or article in a given market; this market may be large or small. The one blacksmith in a country village has a monopoly of his very important trade in that locality, the extent and character of his monopoly being determined largely by the distance which separates him from a possible competitor. If there happens to be no blacksmith within a wide radius, his prices and terms for work may be limited only by the fear of competition springing up. What is true of the single blacksmith is equally true of the single miller, and so on, through a long line of trades and industries. An individual or a partnership or a corporation may have, for the time being, a complete monopoly of the market under its control with power to regulate prices within very wide areas, and yet be doing a legitimate business along legitimate lines. On the other hand, two individuals in a small village may have no monopoly whatsoever and yet engage in an illegal combination the object of which is to defraud or oppress others. If monopoly were a test of legality, the voluntary disappearance of competitors might leave a corporation theretofore legal in such control of the market as to render it illegal, because possessing a monopoly; or a combination illegal in its original objects and purposes might be held legal because so much competition had

arisen as to leave it with no control whatsoever over the market.

§ 301. In the cases sustaining combinations already passed in review, the courts frequently said that the combination under consideration was not illegal because it controlled only a fraction of the market and did not tend to create a monopoly.

§ 302. In cases condemning combinations as illegal, which will be reviewed in a subsequent chapter, it will be found that the courts, under conditions almost precisely similar, have held that the combinations were illegal because they controlled so large a fraction of a given market that they tended to create a monopoly.

§ 303. These decisions cannot be reconciled, but on examination it will appear that the court in each case was influenced largely by the facts; and where the control of the market did not seem to be of serious inconvenience to the public, and the advantages of the combination to the parties thereto seemed to be of a legitimate character, the courts sustain the combination; but where the control of the market seemed to be such as to promise more or less disadvantage to the public, the courts condemn the combination as tending to create a monopoly. In some cases the decisions are so broad as to condemn every combination which tends toward the creation of monopoly; in other cases the courts seem to disregard the tendency and regard only the actual results, namely, whether the control secured was exercised oppressively or not.

§ 304. Every co-operation of individuals in the commercial and industrial world tends in some degree toward a more perfect control of a given market by the individuals so co-operating. That is one of the prime objects of co-operation, and therefore every co-operation of two or more individuals in the industrial and commercial world may be said to *tend* toward the creation of monopoly. If the co-operation is so extensive as to embrace all engaged in a given pursuit, the monopoly for the time being is complete.

§ 305. Whether or not a given combination possesses a monopoly of the market may be an interesting economic fact, but such fact has very little bearing upon the legality or illegality of the original purposes or objects of the combination. The object of a combination may be to secure complete control of

the market, and such object is entirely legitimate, provided the means to be used to attain the object are neither immoral, unlawful nor oppressive.

§ 306. When a court says, "monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good,"¹ that is one of those sweeping generalizations based upon the ancient prejudice against genuine monopolies. A grant from the crown of a monopoly was obnoxious because it forbade competition; nowadays nothing begets competition so quickly as a temporary monopoly, and the more oppressive the monopoly for the time being the quicker and fiercer the competition, until it has come to be almost a business maxim that "if you would control trade you must reduce prices."

§ 307. **Suppression of competition.**—The fact that one of the objects of combination is to get rid of competition is not a test of the legality of a combination. Every combination of two or more individuals engaged in the same trade has for one of its objects the suppression of the competition that exists between them. It is entirely legitimate for individuals, partnerships and private corporations (*quasi*-public corporations, such as railway companies, telephone and telegraph companies, gas companies and companies supplying water to cities, etc., do not fall within this generalization) to combine together for the express purpose of suppressing the competition that exists between them.

§ 308. Competition has its disadvantages as well as its advantages, and may be the death as well as the life of trade.

§ 309. The essential quality of competition is that it shall be the result of free choice of the individual, and not of any legal or moral obligation or duty.²

§ 310. There is no foundation either in law or morals for the proposition that the public have the right to have private owners of private property continue to do business in competition with each other.³

§ 311. The following expressions from opinions in the several cases are in point: "Excessive competition may sometimes re-

¹ Oakdale Mfg. Co. v. Garst (1894), 18 R. L. 484, 28 Atl. R. 978.

² Meredith et al. v. Zinc & Iron Co. (1897), 55 N. J. Eq. 212, 87 Atl. R. 539.

³ Meredith et al. v. Zinc & Iron Co. (1897), 55 N. J. Eq. 212, 87 Atl. R. 539.

sult in actual injury to the public, and competitive contracts, to avert personal ruin, may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy.”¹

§ 312. “But not all combinations are condemned, and self-preservation may justify prevention of undue and ruinous competition when the prevention is sought by fair and legal methods.”²

§ 313. “Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable and do not include all of a commodity or trade, or create such restrictions as to materially affect freedom of commerce.”³

§ 314. The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern cases, except where public franchises and *quasi*-public corporations are concerned.⁴

§ 315. “An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular commodity in a particular city is not illegal as being in restraint of trade unless it appears that they have a monopoly of that commodity.”⁵

§ 316. “I know of no rule of law ever having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price.”⁶

§ 317. “I think it would be unsafe to adopt as a rule of law every maxim which is current in the counting room. It was said some three hundred years ago that trade and traffic were the life of every commonwealth, especially of an island. (*City of London's Case*, 8 Co. 125.) If it be true also that competition is the life of trade, it may follow such premises that he who relaxes competition commits an act injurious to trade; and not only so, but

¹ *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. S. 406.

² *Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. R. 403.

³ *Herriman et al. v. Menzies et al.* (1896), 115 Cal. 16, 85 L. R. A. 318.

⁴ *Chicago Gas Light & Coke Co.*

v. People's Gas Light & Coke Co., 121 Ill. 530.

⁵ Ray, *Contractual Limitations*, p. 223.

⁶ *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant's Ch. 540.

he commits an overt act of treason against the commonwealth. But I apprehend that it is not true that competition is the life of trade. On the contrary, that maxim is the least reliable of the host that may be picked up in every market place. It is in fact a shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century competition in trade has caused more individual distress, if not more public injury, than the want of competition. Indeed, by reducing prices below or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract.”¹

§ 318. “The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it.”²

§ 319. “It cannot be doubted but that the defendant had the right to buy out all the envelope manufacturing business and to consolidate the same, and even though they thereby obtain power to end competition and arbitrarily fix prices. Because some of these results flow from a combination where the parties remain the owners of the business, it does not necessarily follow the combination is unlawful.”³

§ 320. “While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation.”⁴

¹ Kellogg v. Larkin (1851), 3 Pinney (Wis.), 123, 56 Am. Dec. 178-181.

² People v. Sheldon, 139 N. Y. 251, 34 N. E. R. 785.

³ Cohen v. Berlin & Jones Envelope Co. (1899), 56 N. Y. S. 588.

⁴ M. & L. R. R. Co. v. Concord R. R. Co., 66 N. H. 100, 20 Atl. R. 383, 9 L. R.

§ 321. "It is not obnoxious to good morals or to the rights of the public that two rival traders agree to consolidate their concerns, and that one shall discontinue business and become a partner with the other for a specified term. It may happen as the result of such an arrangement that the public have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly the public have no right to complain so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly."¹

§ 322. "If the business of a private individual or corporation is threatened with competition, a contract with the competitor that he shall abandon his enterprise and take employment at an agreed compensation with such corporation or individual is not against public policy. Such an agreement fairly entered into is legitimate business."²

§ 323. These and many similar utterances which might be cited show that the courts are by no means unanimous in holding that whatever tends to restrict competition is contrary to public policy. Whether or not competition is on the whole beneficial is an economic question rather than a legal one.

§ 324. Even though a combination may have the effect to diminish the number of competitors in business and thereby suppress competition, it does not follow that it is illegal. Such a rule would produce greater public injury than that which it seeks to cure, and it would be impracticable. Such a rule would forbid partnerships and would forbid sales of business and good will by those engaged in a common business; it would cut off consolidations which secure the advantages resulting from united capital and economy of administration; and it would hamper the familiar conduct of commerce in many ways.³

§ 325. It is clearly established that either an individual, a partnership or a corporation that has built up a business and a valuable good will may, with the consent of all parties interested, sell the same to any party or corporation that wishes to purchase, and in order to get the full benefit of the good

A. 689, 47 Am. & Eng. R. R. Cas. 359.

¹Dolph v. Troy Laundry Machinery Co. (1886), 28 Fed. R. 553.

²Oakes v. C. W. Co., 143 N. Y. 430, 38 N. E. R. 461.

³Oakdale Mfg. Co. et al. v. Garst (1894), 18 R. L. 484, 28 Atl. R. 973.

will that has been built up the vendor may agree for a limited period and within a limited area not to engage in the same business.¹

§ 326. Every consolidation which results from the purchase of a rival competing business tends to suppress competition, and yet such consolidations are not only upheld, but agreements for the same are enforced by the courts.

§ 327. Furthermore, it is well settled that agreements which have for their purpose the realization of a fair price for the product manufactured and sold by the parties thereto are valid and binding, even though in some respects they operate to suppress competition and restrain trade.²

§ 328. Even in the case of a *quasi*-public corporation, a gas company, the court of appeals of New York held that one company might acquire control of a rival corporation for the express purpose of preventing competition.³ It is, perhaps, a matter of doubt whether the courts generally will go to the extent reached in this decision. *Quasi*-public corporations stand on a very different footing from private corporations, and, within constitutional limitations, the people have a right to interfere and control consolidations and combinations of corporations performing public functions and enjoying franchises and privileges of a more or less exclusive nature.

§ 329. Competition is the cause of most of the failures in the commercial and industrial world. It is drastic in its operation, and probably causes more trouble and disaster the world over than all the combinations taken together. So far as the practical operation of a combination is concerned, it frequently happens that the real danger is not that competition will be destroyed by the absorption of rival plants, but that the combination will use its power to crush existing and threatened competition by so slaughtering prices for a time as to ruin all who are not parties to the combination. For the time being the consumers may be directly and largely benefited by such

¹ *Tode v. Gross*, 127 N. Y. 480, 28 N. E. R. 785; *Cohen v. Berlin & Jones* E. R. 469; *Oakdale Mfg. Co. v. Garst* Envelope Co. et al. (1899), 56 N. Y. (1894), 18 R. L. 484, 28 Atl. R. 973. See Supp. 588; *Central Shade Roller Co. v. Cushman* (1887), 143 Mass. 362, 9 N. E. R. 629.

³ *Rafferty et al. v. Buffalo City Gas*

² *Sheldon Case*, 139 N. Y. 251, 34 N. Co. (1899), 37 App. Div. 618.

slaughter of prices. The object of the combination is undoubtedly to gain such control of the market as to enable it to raise prices in the near future, but this object is not always attained, and if attained it is seldom that prices are maintained for any great length of time abnormally high. But aside from these details of the practical operation of a combination, it is clear from the propositions above laid down that the suppression of competition is not a test of legality.

§ 330. **Restraint of trade.**— Among the reasons frequently assigned for holding combinations illegal is that they are “in restraint of trade,” as, for instance, “It is in restraint of trade and unlawful for a manufacturer to become a party to a combination which shall prevent any of his customers from obtaining other goods of other manufacturers because those customers violate the agreement with him in respect to the cutting of prices.”¹ Now such a combination may be unlawful because a conspiracy, but it is not unlawful because “in restraint of trade.” This is an illustration of how loosely the phrase is used by the courts.

§ 331. The law of “contracts in restraint of trade” will be fully considered further on. That law had its origin in contracts whereby a party bound himself to refrain from following his trade or profession for a period in a given territory; it had no connection whatsoever with combinations; and the public policy which condemns such contracts rests upon considerations entirely foreign to any rules against combinations. The law of “contracts in restraint of trade” is of interest in connection with the law of combinations for two reasons only, namely: First, properly, because in forming combinations it is frequently the practice to take from parties thereto a bond or an agreement not to engage in the same business for a period in the territory covered — the validity of these contracts must be determined on their merits; second, improperly, because courts, as already stated, so often urge as one of the reasons why a combination is illegal, that it is “in restraint of trade.”

§ 332. Contracts are no longer void because in restraint of trade, but they may be void because in unreasonable restraint of trade. As will clearly appear hereinafter, the courts uphold and enforce contracts whereby a party selling the good will

¹ *Parker & Sons v. National Druggists' Ass'n et al.*, 50 N. Y. S. 1064.

of his business or profession binds himself not to engage in the same trade or practice the same profession within a limited area for a limited period. The test of the validity of such a contract is whether the restraint imposed is reasonable under the circumstances, and is no more than is reasonably necessary to properly protect the party purchasing the good will of the business or profession in the enjoyment of the same. If the restraint is no more than is reasonably necessary for such protection, the courts will not only uphold the contract, but will enforce its specific performance, and will, if necessary, restrain the vendor by injunction from competing with his vendee within the locality described. Unless contracts of this nature were upheld, the man who by industry has made the good will of his business or profession valuable would be unable to dispose of it.

§ 333. Early efforts of interested parties to bind others to refrain from practicing a profession or following a trade in localities of a wide area, and for long and unreasonable periods of time, brought contracts in restraint of trade into disrepute, and for a time the courts were inclined to hold all such contracts invalid as contrary to public policy, upon the ground that the public was deprived of the valuable services of the individual so bound. The odium which attached to these contracts, carried as they were to unreasonable limits, has in a measure clung to the phrase "contracts in restraint of trade,"—just as the odium attaching to ancient monopolies still clings to the term "monopoly;" and this odium is made to reflect upon combinations by holding that agreements creating combinations are "in restraint of trade," whereas, as a matter of fact, agreements at the foundation of combinations have no resemblance whatsoever to contracts in restraint of trade.

CHAPTER 9.

ILLEGAL COMBINATIONS.

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§ 334. **Illegal combinations generally.**— All combinations are presumed to be legal, and only those combinations are illegal which are affirmatively shown to be either

- (A) Conspiracies; or
- (B) Contrary to statute.

§ 335. **Statutes against combinations.**—As has been said several times in the progress of this discussion, the statutes, both state and federal, affecting combinations will receive separate consideration. Many of these statutes are so sweeping and so arbitrary in their terms that it is utterly impossible to find any place for them in a logical investigation of the principles underlying the law of combinations.

§ 336. **The common law.**—Aside from statutory provisions the legality of every combination must be determined according to certain definite legal principles. These principles must necessarily be independent of shifting popular prejudice and political considerations. It is the glory of the common law that its fundamental conceptions are sufficiently elastic to cover the rapidly developing relations and conditions of a progressive society, and it would be strange indeed if in this latter end of the nineteenth century relations and conditions developed of a character so new and novel that the fundamental principles of the common law were found either inapplicable or inadequate to control. The common law is a complete philosophy of legal relations, and as such must necessarily embrace and provide for every contingency that can possibly arise in the development of society. It is not a code, nor is it so much a science as a philosophy, and as a philosophy in its development it keeps pace with the development of man himself, so that whatever man does for or against his fellow-man finds its approval or condemnation in the common law. The very phrase “common law” in its broadest significance means the law common to all men, that is, those rules of conduct of such universal validity that they are common to all men; and the common law would be a petrification indeed if it were possible for man to devise a new conduct or a new relation which would not be covered comprehensively by some fundamental principle of the common law.

§ 337. **Conspiracy.**—Illegal combinations are not unknown to the common law; they fall naturally and logically under the law relating to conspiracy. As has been already stated, a conspiracy is the illegal species of the genus combination. In and of itself the term “combination” imports neither legality nor illegality, any more than the term “co-operation” or “association,” or the still more limited term “partnership” or “cor-

poration.” Or rather, it is more exact to say that the term “combination” imports legality rather than illegality, for the law has provided a specific term, namely, “conspiracy,” which covers all combinations that are illegal; and therefore a casual reference to combination or association should imply to the ordinary mind legal forms of co-operation, since if illegal forms are meant the term “conspiracy” is used.

The common law governing conspiracies is broad enough to cover every conceivable form of illegal combination, unless it is seriously proposed to arbitrarily limit the extent to which both labor and capital shall be permitted to co-operate, and to say combinations greater than a given magnitude are illegal simply on account of their magnitude, whereas combinations of a lesser magnitude are not illegal. There is no conceivable element of illegality attaching to a combination which is not covered by some principle or proposition of the common law relating to conspiracies. These controlling principles of the common law will be investigated under the following heads:

- (A) The law of conspiracy;
- (B) The law of criminal conspiracy;
- (C) The law of civil conspiracy.

(A) THE LAW OF CONSPIRACY.

§ 338. The existence of a conspiracy is subject to investigation in —

- (a) The criminal court.— Upon indictment or information.
- (b) The civil court.— Directly by actions at law instituted by parties injured to recover damages sustained as the result of the conspiracy; or by proceedings in the nature of *quo warranto* instituted on behalf of the public; or indirectly and collaterally by suits and controversies in which the court is called upon to construe or enforce bonds, contracts and agreements upon which the combination is founded or in which the combination is interested.

§ 339. Wider latitude exercised on the civil side.— As the cases of illegal combinations are reviewed, it will be found that, wide as has been the latitude exercised on the criminal side in extending the law of criminal conspiracy, the courts on the civil side have exercised a still wider discretion in holding combinations to amount to civil conspiracies, and in refusing to en-

force contracts and agreements upon which they are founded or in which they are interested.

§ 340. Definition of conspiracy restated.—The definition of conspiracy hereinbefore given¹ may very properly be restated in this connection:

Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive or immoral; or (b) something that is not unlawful, oppressive or immoral, by unlawful, oppressive or immoral means; (c) something that is unlawful, oppressive or immoral, by unlawful, oppressive or immoral means.

This definition is comprehensive in its nature, and includes both civil and criminal conspiracies. While many of the decisions go so far as to either hold or intimate that parties are subject to indictment and conviction for combining together to do something that is simply oppressive, but which is not in any sense criminal, these decisions are extreme in their nature and do not command the approval of the sober judgment of the disinterested legal mind. The civil court may award damages to parties injured by a conspiracy to oppress, but it violates the sense of justice to say that a man shall be punished criminally for doing that which is neither directly nor indirectly a violation of any provision of the criminal law. Furthermore, the civil courts will give full effect to the doctrine of public policy, and will refuse to enforce any agreement lying at the foundation of a combination to do something contrary to public policy; but it will not do to say that the parties to a combination, which is illegal because in its objects it contemplates doing something contrary to public policy, are subject to prosecution and conviction when at no time did they intend doing anything of a criminal character.

(B) THE LAW OF CRIMINAL CONSPIRACY.

§ 341. Criminal conspiracy defined.—A criminal conspiracy is a combination of two or more persons to do something which is criminal, or to do something which is not criminal by criminal means, or something which is criminal by criminal means.

The foregoing is a strict and logical definition of a criminal

¹See § 171.

conspiracy. It excludes from the category of criminal conspiracies all conspiracies which contemplate neither as a means nor an object some criminal purpose. Under this strict definition a conspiracy is not criminal unless in either the means or the object contemplated the criminal element appears.

§ 342. Chief Justice Shaw's definition.—The well-known definition of Chief Justice Shaw¹ is as follows: "Without attempting to review or reconcile all the cases, we are of opinion that as a general description, though perhaps not a precise or accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. We use the term 'criminal or unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy and punishable by indictment;" and he adds, "but yet it is clear that it is not every combination to do unlawful acts to the prejudice of another which is punishable as conspiracy." This definition has been frequently approved,² but it is broader than the definition suggested, in that it makes criminal a combination to do things which may lawfully be done by individuals. The combination in itself is treated as criminal, although its purposes include no criminal act.

§ 343. Lord Denman's antithesis.—Lord Denman's famous dictum that "the indictment ought to charge a conspiracy either to do an unlawful act, or a lawful act by unlawful means,"³ is quite as broad as the definition suggested by Chief

¹ *Com. v. Hunt* (1842), 4 Met. 111.

² *Pettibone v. United States* (1893), 148 U. S. 197, 13 Sup. Ct. 542; *The Mussel-Slough Case* (1880), (C. C.), 5 Fed. R. 680; *United States v. Sacia* (1880), (D. C.), 2 Fed. R. 754; *United States v. Wooten* (1887), (D. C.), 29 Fed. R. 702; *United States v. Cassidy* (1895), (D. C.), 67 Fed. R. 698; *State v. Rowley* (1837), 12 Conn. 101; *Smith v. People* (1860), 25 Ill. (15 Peck), 17, 76 Am. Dec. 780; *Spies v. People*

(1887), 122 Ill. 1, 12 N. E. R. 865; *State v. Mayberry* (1859), 48 Me. 218; *Com. v. Hunt* (1842), 45 Mass. (4 Met.) 111, 38 Am. Dec. 346; *Alderman v. People* (1857), 4 Mich. 414, 69 Am. Dec. 321; *People v. Melvin* (1810), 2 Wheeler Cr. Cas. 262; *People v. Trequier* (1823), 1 Wheeler Cr. Cas. 142; *State v. Snell* (1893) 2 Ohio N. P. 55; *Com. v. Tack* (1868), 1 Brewst. 511.

³ *Jones' Case* (1832), 4 B. & Ad. 345;

Justice Shaw. In later cases ¹ Lord Denman expressed himself somewhat differently.

§ 344. The objections to these and all similar definitions lie in the ambiguous meaning of the terms "unlawful" and "illegal." These terms are comprehensive, and include acts which are criminal and acts which are not criminal. All objects and acts which are criminal are, of course, unlawful, but all objects and acts which are unlawful are by no means necessarily criminal.²

Richardson's Case (1834), 1 M. & Rob. 402; King v. Seward (1834), 1 A. & E. 706.

¹ Queen v. Peck (1839), 9 A. & E. 686, and Queen v. King (1844), 7 Q. B. 782.

² The casuistry in which one is involved by attempting to make criminal a combination which contemplates unlawful but not criminal objects is illustrated by the following discussion of the meaning of the word "unlawful" used in connection with criminal conspiracies. Referring to a paragraph from the opinion of Willes, J., in the House of Lords in the case of Mulcahy (1868), L. R. 3 E. & L. 806, Mr. Wright, in his able little monograph on the law of criminal conspiracies, quotes the paragraph as follows:

"A conspiracy consists not merely in the intention of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself . . . punishable, if for a *criminal* object or for the use of *criminal* means."

And comments thereon:

"An example which, in its use of both 'unlawful' and 'criminal,' shows that the antithesis has not, in the most modern times and in the highest court, been understood to involve the doctrine for which the antithesis has been sometimes cited. Nor is it

difficult to show that the antithesis cannot be and cannot have been intended to be a complete definition of criminal combination. In order that a phrase may be such a definition, its own terms must be used in a definite sense with reference to the purpose for which the definition is to be used. Therefore, if this phrase is a definition for legal purposes, the word 'unlawful' or 'illegal' (these words are used interchangeably throughout the cases) must be used in a definite legal sense. But there seem to be only three definite legal senses of the word 'unlawful.' It may mean criminal, *i. e.*, prohibited by way of a criminal sanction or penalty; or it may mean wrongful, *i. e.*, prohibited by way of a civil sanction or remedy; or it may be used in that peculiar sense in which it is applied to certain contracts, such as some contracts in restraint of trade and contracts in furtherance of immorality, which the law refuses to enforce. Moreover, in which ever of these senses the word 'unlawful' is used, it must, if it is to be the defining word in the definition of criminal combination, mean unlawful with reference to the conduct of an individual; for if it meant unlawful with reference to combination, it would do nothing for defining the meaning of 'unlawful' as applied to combinations, and it would be merely a restatement and not a definition. Now it is plain that, if the phrase in question is the complete definition of a

§ 345. **Meaning of the word “unlawful” in connection with criminal conspiracy.**—It was not until the end of the seventeenth century that the term “unlawful” or “illegal” as describing the purpose of a conspiracy was used by the courts in any other sense than that of “criminal.”¹

criminal combination, the word ‘unlawful’ does not now denote what would be criminal in an individual; for it is well established that, in the case of cheats and perhaps in some other cases, it may be criminal to combine to do what is not criminal for one man to do. Nor does it mean whatever would be wrongful in an individual, so as to subject him to a liability to a civil remedy, for not only is there the express authority of *Turner’s Case* (1811), 13 East. 228, which has never been questioned on this point, to the contrary effect, but it would be against common sense to hold criminal an agreement between two persons to walk in a park without leave, or to dishonor a bill. Nor does it mean unlawful in the third or neutral sense, for this would exclude combinations to commit crimes, and would include many agreements which may be innocent or even laudable apart from public policy. Nor, since the word when applied to criminal combinations is narrower than it is when used in either of the two latter senses, can it mean ‘unlawful’ in a sense co-extensive with an aggregate composed of all three or any two of these senses. The truth is that the word ‘unlawful,’ when it is used as co-extensive with criminal combination, now includes all criminal purposes and some purposes wrongful but not criminal apart from combination; and it has been made a question whether it does not include some purposes of the third or neutral kind. An expression cannot be the definition of conspiracy, the defining part of which is itself so devoid of definiteness for the

purposes for which a definition is required.

“Nevertheless, there is much value in the phrase for the purposes to which it has commonly been applied by the judges, viz., to indicate:

“(a) On the one hand, that mere combination is not in itself criminal, but must, if it is to be regarded as criminal, at least be for purposes (as ‘ends’ or as ‘means’) which are in themselves in some sense unlawful, independently of combination.

“(b) On the other hand, that, assuming purposes sufficiently ‘unlawful’ in themselves, the gist of the crime of criminal combination consists in the agreement for such purposes, and not in their execution.”

¹“This is plainly the sense of the phrase ‘*defendu en la ley*,’ used in the Anonymous case (27 Edw. 3), 1354, art. Of Inq., 27 Ass. p. 138 b, pl. 44, in 1354, which referred to the prohibition contained in 33 Edw. 1. It is also plainly the sense in which Coke uses the expressions ‘unlawful’ and ‘*defendu en la ley*’ (‘prohibited by the law’ in the translations) in the *Poulterers’ Case* (1611, 9 Rep. 55, Moore, 814), as appears both from his reference to the case in 1354 and from his recommendation of the rule for punishment of the combination without any act completed, as being a doctrine of mercy to the intending offender. So in *Timberley’s Case* (1663; *Timberley and Childe*, 1663 (or *Kimberty*), 1 Sid. 68, 1 Lev. 62, 1 Keb. 203, 1 Keb. 254), the ‘illegal thing’ proposed was the commission of a crime of conspiracy, properly so called. So in *Thorp’s Case* (1697, 5 Mod. 221), (if that can be regarded a

§ 346. Development of the law of criminal conspiracy.¹—Prior to the sixteenth century the only crime of conspiracy which seems to have been known to the law was that defined by the Ordinance of Conspirators,² and the crime consisted of confederacy for the malicious promotion of indictments and pleas, and for embracery and maintenance of various kinds. Later various statutes were enacted — some of which have already been referred to — against combinations for treasonable purposes, for breaches of the peace by merchants to disturb the market and control prices, and against combinations by masons and carpenters and laborers to raise wages or control the hours of employment, against combinations of victualers to raise prices. All these combinations contemplated purposes specifically condemned as criminal.

§ 347. The modern law of conspiracy.—The modern law of conspiracy, as traced by Mr. Wright, grew “out of the application to cases of conspiracy, properly so called and as defined by the 33 Edw. I., of the early doctrine that since the gist of crime was in the intent, a criminal intent manifested by any act done in furtherance of it might be punishable, although the act did not amount in law to an actual attempt.”³ In accordance with this view it was determined in 1354, and again in 1574,⁴ and finally settled on the authority of the former of those cases by the Star Chamber in 1611,⁵ that although the

case of conspiracy), the question made by the court was whether any act indictable in itself had been done. (Cf. as to the sense in which ‘unlawful purpose’ and ‘unlawful act’ were used in the older law of murder: 1701, Plummer, Kel. 109; Keite, 1 Ld. Raym. 138 (correcting Coke, 3 Inst. 56, 57); 1727, Oneby, 2 Ld. Raym. 1485; Fost. P. C. 258, 259.) It is believed that the only early authority for a more extended doctrine is the expression in the Termes de la Ley, title Confederacy, where it is said that, ‘*confederacy est quant deux ou plusors luy mesmes confederent de faire ascune male ou damage al auter, ou de faire ascune chose illoyal.*’ But that this passage has no authority,

in so far as it goes beyond the Poulterers’ Case, appears from the fact that every other expression in the title is taken directly from the Poulterers’ Case.” Wright, Crim. Consp., pp. 51, 52.

¹ For the history of the law of criminal conspiracy we are largely indebted to the valuable little book on criminal conspiracies and agreements by Mr. Wright (American edition by Mr. Hampton L. Carson of Philadelphia).

² 33 Edw. 1. See Wright, Crim. Consp., p. 5.

³ Cp. by Mr. Greaves, in Cox’s C. L. Cons. Acts, p. lxxxiv.

⁴ Sidenham v. Keylway, Cro. Jac. 407.

⁵ Poulterers’ Case.

crime of conspiracy, properly so called, was not complete unless in a case of conspiracy for maintenance some suit had been actually maintained, or in a case of conspiracy for false and malicious indictment the party against whom the conspiracy was directed had been actually indicted and acquitted, yet the agreement for such a conspiracy was indictable as a substantive offense, since there was a criminal intent manifested by an act done in furtherance of it, viz., by the agreement; and from this time, by an easy transition, the agreement or confederacy itself for the commission of the conspiracy came to be regarded as a complete act of conspiracy, although traces of the original distinction between a completed conspiracy and the mere agreement or confederacy to commit it long continue to be found.¹ Moreover since in the Poulterers' Case nothing had been done which amounted to a complete crime under the statute, it followed that the criminality of the agreement must be in some sense a criminality by common law; and Lord Coke's observations on this point in his report of that case soon received an extended application, and grew into a rule that a combination to commit or to procure the commission of any crime was criminal and might be prosecuted as a conspiracy, although the crime might have nothing to do with the crime of conspiracy, properly so called."²

¹(1699) *Savile v. Roberts*; (1705) 1 *Ld. Raym.* 373, 5 *Mod.* 394, 1 *Salk.* 13; *Best* (1811), 2 *Ld. Raym.* 1167, 1 *Salk.* 174, 6 *Mod.* 185; *Turner* (1811), 13 *East*, 228.

²"It is mentioned in 1665 (*Starling's Case*, 1 *Sid.* 174, 1 *Keb.* 650, 1 *Lev.* 125) that there were precedents for informations in the exchequer for conspiracies to commit offenses relating to the revenue; and during the reign of Charles II., and the two following reigns, the tendency towards the general establishment of the doctrine appears in the practice of inserting by way of aggravation (by counsel for the crown in 1697, *Thorp*, 5 *Mod.* 221) in the inducements or indictments or informations for misdemeanors, the words '*conspiratione inter eos habita*,' or

'*per conspiracyem*,' or '*conspirantes*,' or '*conspirans*,' or '*machinantes et aggravantes*,' especially in cases of cheats. Instances of this practice will be found in 1674 (*Thody*, 1 *Ventr.* 234), 1682 (*Ld. Gray*, 2 *St. Tr.* 519, 9 *St. Tr.* 127), and 1697 (*Thorp*, *supra*; see the argument of the counsel for the crown), and in some cases (see (1685), *Salter*, 5 *Esp.* 1124; (1704) *Orbell*, 6 *Mod.* 42) this seems to have been done in conformity with the practice in civil actions on the case (1 *Wms. Saund.* 229 b. n. 4), even where the whole frame of the indictment was confined to a single defendant. The convenience of this mode of procedure in permitting the conviction of persons without proof of a complete crime had already been proved in indictments

§ 348. A criminal object essential.—So far it appears that a criminal conspiracy did not exist unless there was, first, the combination, and secondly, the intent to do that which was contrary to the criminal law. Upon proof of the combination and the criminal intent the crime of conspiracy was complete, the combination being the gist of the offense.

§ 349. Development of doctrine that criminal intent is not essential.—The development of the comparatively modern doctrine that a criminal purpose is not essential to constitute the crime of conspiracy is traced through a line of cases involving the practice of deceit for the purpose of defrauding others.¹

In those earlier days when men sought to correct all the evils they suffered by criminal prosecution, the doctrine that a combination may be criminal in itself, although its objects and purposes are not criminal, was found a convenient means of extending indefinitely the jurisdiction of the criminal courts. Under this extraordinary doctrine no limitations were placed upon either the caprice or the discretion of the criminal courts. Each day might bring forth its new offenses, and men engaged

for treason, and seems to have completely established the practice in the reign of Geo. I." Wright, *Crim. Consp.*, pp. 6, 7.

¹See Wright, *Crim. Consp.*, p. 9. "During the seventeenth and the earlier part of the eighteenth century the law of cheats was still unsettled, and numerous cases are to be found in which cheats not of a public nature and not within the statute of false tokens (33 Hen. 8, ch. 1) were held indictable; so that Hawkins, writing in 1716, defined the crime of cheating to consist in 'deceitful practices in defrauding or endeavoring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty;' and several cases of such cheats had been prosecuted by way of conspiracy. But in 1720 (Wilders, cited in 2 Burr. at 1128) it was held that private unfair dealings, such as the fraud of a brewer in selling to a publican casks of beer untruly

marked as to their measure, were not indictable; and the same view was taken by the King's Bench in 1730 (Bryan) in the case of a false pretense; and finally settled in 1761 (Wheatley). The same cases, however, which determined that such cheats were not indictable in an individual, reserved their criminality in cases of conspiracy. Different grounds are stated for this reservation. The judges are made to put it in some cases on the ground that the combination makes the cheat public; in others (1761, Wheatley) on the ground that common prudence cannot guard against combination to defraud. Whatever may be the true ground of the doctrine it has been found too beneficial to be questioned; and it has long been established law that a combination to defraud may be criminal, although the proposed deceit is not such as would be criminal apart from the combination."

in lawful pursuits might find themselves arrested and convicted as criminals for simply co-operating together to do that which each individual might do alone.

§ 350. An early American case holding contrary views.— In an early American case¹ the supreme court of Maryland — opinion by Buchanan, J.— reviewed at great length the law of criminal conspiracies, and the court arrived at the following conclusions regarding the common law:

(1) That the crime of conspiracy was known to the common law prior to the statute of 33 Edw. I.²

(2) That the statute referred to did not affect the common law concerning conspiracies, but was simply supplementary thereto.

(3) A conspiracy to do that which is criminal *per se* is an indictable offense at common law.

An indictment will also lie at common law:

(5) “For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only.”³

(6) “For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public.”⁴

(7) “For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practiced by an individual, as by verbal defamation, and that whether it be to charge him with an indictable offense or not.”⁵

¹ State v. Buchanan et al. (1821), 5 Har. & John. 317.

² The statute is in these words: “Conspirators be they that do confeder or bind themselves by oath, covenant or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers. And stewards and

bailiffs of great lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estates of their lords or themselves.”

³ King v. Lord Gray et al., Moore, 788, and the case of Sir Francis Blake Delval, 3 Burr. 1434, 1 W. Bl. 410.

⁴ King v. Journeymen Tailors of Cambridge, 8 Mod. 11 (for a conspiracy to raise their wages, either of whom might legally have done so); and King v. Edwards, 8 Mod. 320.

⁵ Timberly v. Childe, 1 Sid. 68, 1 Lev. 62; Childe v. North & Timberly, 1 Keb. 203; Queen v. Armstrong, Harrison et al., 1 Ventr. 304; Queen v.

(8) "For a conspiracy to cheat and defraud a third person accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual."¹

(9) "For a malicious conspiracy to impoverish or ruin a third person in his trade or profession."²

(10) "For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured."³

(11) "For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time."⁴

(12) "That a conspiracy is a substantive offense and punishable at common law, though nothing be done in execution of it."⁵

(13) "That in a prosecution for a conspiracy it is sufficient to state in the indictment the conspiracy and the object of it; and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent."⁶

§ 351. From these several propositions the court drew this general conclusion: "That every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense though nothing be done in execution of it, and no

Best et al., 2 Ld. Raym. 1167; King v. Kinnersley & Moore, 1 Stra. 193; Queen v. Martham Bryan, 2 Stra. 866; King v. Parsons et al., 1 W. Blk. 392; King v. Rispal, 3 Burr. 1320, 1 W. Blk. 368.

¹ Breerton v. Townsend, Noy's R. 103; King v. Skirrett, 1 Sid. 312; Queen v. Mackarty et al., 2 Ld. Raym. 1179; Queen v. Orbell, 6 Mod. 42; King v. Wheatly, 2 Burr. 1127; King v. Lara, 6 T. R. 565.

² King v. Cope et al., 1 Stra. 144; King v. Eccles, 1 Leach, 274; King v. Leigh, 1 C. & K. 28; Macklin's Case, 2 Chitty, C. L. 495; and the case of Clifford v. Brandon, 2 Camp. 358.

³ King v. Robinson & Taylor, 1 Leach, 38; King v. Berenger et al., 3 M. & S. 67; King v. Edwards et al., 1 Stra. 707.

⁴ King v. Gill & Henry, 2 B. & Ald. 204.

⁵ Book of Assises, ch. 44; Poulterers' Case, 9 Rep. 55; King v. Edwards, 1 Stra. 707; King v. Eccles, 1 Leach, 274; King v. De Berenger et al., 3 M. & S. 68; King v. Gill & Henry, 2 B. & Ald. 204, and all the authorities that the conspiracy is the gist of the offense.

⁶ King v. Eccles, 1 Leach, 274; King v. Gill & Henry, 2 B. & Ald. 204.

matter by what means the conspiracy was intended to be effected, which may be perfectly indifferent and make no ingredient of the crime, and therefore need not be stated in the indictment."

§ 352. In answer to the objection that the practical application of this doctrine would convict parties for acts which they did not know were criminal, the Maryland court said: "It is not necessary, as has been contended on the part of the defendants in error, that every one should in fact know what the law is, before he can be punished for what the law forbids. Such a doctrine would be fraught with the most mischievous consequences to society; it is enough that the offense was known to the law before, and if it be *malum in se* there is an inward monitor, always present, to warn, advise and instruct."

This reasoning will hardly commend itself to the unprejudiced mind. In the first place, it is by no means satisfactory as reasoning; in the second place, it is by no means satisfactory as law. The maxim that "every man is charged with a knowledge of the law" means that he is charged with the knowledge of what the law designates as offenses. If the law fails to define an offense as an offense, the individual cannot be charged with knowing more than the law itself knows. The "inward monitor"—that is to say, the conscience—warns the individual against many an act which the law does not condemn. It is hardly a safe proposition that it is a crime for two or three to combine together to do whatsoever the conscience disapproves.¹

¹ In support of the contention that conspiracy was an offense at common law and that the statute of 33 Edw. I. introduced no new rule, but was merely in affirmance of the common law, and that the gist of the offense of conspiracy consisted in the combination or confederacy and not in the actual execution of such purpose, the following cases were cited and most of them reviewed at length: King v. Timberly, 1 Keb. 254; King v. Parris et al., 1 Sid. 431, 1 Vent. 49; s. c. cited in 2 East's C. L. 823; King v. Cummings et al., 5 Mod. 180; Queen v. Daniel, 6 Mod. 99, 2 Ld. Raym. 1116;

s. c., Lord Gray's Case, Moore, 788; Scrogs v. Peck & Gray, id. 562; Queen v. Glanvil, Holt R. 354; Queen v. Parry et al., 2 Ld. Raym. 865; King v. Venables, 8 Mod. 378; King v. O'Brian, 13 Vin. Ab. 460, cited in 2 East's C. L. 825; King v. Grimes & Thompson, 3 Mod. 220; King v. Sterling (The Tubwomen's Case), 1 Sid. 174, 1 Lev. 125; s. c., 1 Keb. 650; s. c., Seele's et al. Case, Cro. Car. 557; Queen v. Blackett & Robinson, 7 Mod. 89; King v. Parsons, 1 W. Blk. 392; King v. Benfield & Saunders, 2 Burr. 980; King v. Spragg et al., id. 993; King v. Wheatly, id. 1127, 1 W. Blk.

§ 353. **The strict definition is fair and just.**—Decisions to the contrary notwithstanding, it is not consistent with either English or American notions of justice that it should lie in the varying and whimsical discretion of the court or jury to hold men as criminals for simply combining to do that which is not criminal by means which are not criminal. There is little to be said by way of answer to the following by the late Sergeant Talford: "It is not easy to understand on what principle conspiracies have been holden indictable, where neither the end nor the means are in themselves regarded by the law as criminal, however reprehensible in point of morals. Mere concert is not in itself a crime; for associations to prevent felons, and even to put the law in force against political offenders, have been holden legal. If, then, there be no indictable offense in the object, no indictable offense in the means, and no indictable offense in the concert, in what part of the conduct of the conspirators is the offense to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject that at one time the immorality of the object is relied on; at another the evidence of the means; while at all times the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless."¹

275; s. c. cited in 2 East's C. L. 825; King v. Govers, Sayer's R. 206; King v. Cope et al., 1 Stra. 144, cited in 2 East's C. L. 825; King v. Bower, Cowp. 323; King v. Croke, id. 29; Waite's Case, 1 Leach, 83, 2 East's C. L. 570; Bazeley's Case, 2 Leach, 973, 2 East's C. L. 571; Macklin's Case, 2 Chitty, C. L. 495; Hevey's Case, 2 East's C. L. 856, 1010; King v. Mason, 2 T. R. 581; King v. Mawbey et al., 6 T. R. 628; Clifford v. Brandon, 2 Campb. 358, 372 (note); King v. Philips, 6 East's R. 464; Nelson's Just. 171; Rex v. Norton et al., 1 Tremaine, 88; Rex v. Crisp et al., id. 84; Rex v. Record et al., id. 86; Rex v. Wilcox, id. 91; Rex v. Taydler et al., id. 94; Rex v. Albone et al., id. 97; Rex v. Montague, id. 209; 3 Chitty's C. L. 1145-1193;

Com. v. Ward et al., 1 Mass. 478; Com. v. Judd et al., 2 Mass. 329; Com. v. Tibbetts, 2 Mass. 536; Journeymen Cordwainers' Cases in New York, Philadelphia and Baltimore, referred to hereinafter.

¹Mr. Wharton argues as follows against the extension of the law of criminal conspiracy:

"But to extend indictable conspiracies so as to include cases where acts, in themselves not indictable, are attempted by concert, involving neither false statement nor concerted force, should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an indifferent act be held to make such act criminal. We all know what offenses are indict-

§ 354. It is a dangerous extension of the power of the courts in the administration of the criminal law to say that an individual may do certain things and not be liable criminally, but if he leans over his fence and talks with his neighbor and asks

able, and if we do not, the knowledge is readily obtained. Such offenses, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to be so when brought about by concert which involves neither fraud nor force. These there has never been any judicial attempt to define or legislative attempt to codify. No man can know in advance whether any enterprise in which he may engage cannot in this way become subject to prosecution. It is essential to the constitution of an indictable offense, as is elsewhere shown, that it should be proscribed either by statute or by common law; but conspiracies to commit by non-indictable means non-indictable offenses, if we resolve them into their elements, are neither proscribed by common law nor by statute. By force of their definition their object is not *per se* proscribed, and the other ingredient in their constitution, that of an association of individuals to effect a common end, is essential to all actions in which two persons engage. When we remember also that, as we have seen, it is necessary to a righteous administration of public justice that punishment should be attached only to acts which are made penal by rules which are pre-announced and constant, the objection just stated acquires additional weight. An act of business enterprise in purchasing

goods in a cheap market for the purpose of selling them in a dear market, which in one phase of judicial sentiment would be regarded as a meritorious impetus to commercial activity, would be, in another phase of judicial sentiment, as it once has been treated, an indictable offense. Legislative and judicial compromises which one court may view as essential to the working of the political machine another court may hold to be indictable as a corrupt conspiracy. Nor can we continue to accept the risks by which this undefined extension of conspiracy has been justified. It used to be said that the combination of a plurality of persons to do an act invests it with a criminality which it does not otherwise possess. Undoubtedly this is so with riot, which depends on tumult, which again depends on plurality of agents; but riot is positively defined by law, and all who engage in a riot have the means to know what it is, and that it is punishable. But can this be predicated of combinations which the law does not in advance pronounce to be unlawful? One of the two alternatives we must here accept: either we must, with the old English judges, look upon all voluntary combinations as suspicious and objects of judicial suppression, or we must declare that only such combinations are penally cognizable as are made so either by statute or by a settled judicial construction of the common law. . . . The conclusion is that: 1st. The offense of conspiracy at common law is limited to confederacies to effect illegal objects as ends or means. 2d. Confederacies to pervert public justice or

his neighbor's help, both are immediately subject to indictment, not for doing or attempting to do anything, but for agreeing to do together that which either could do separately — the agreement is criminal, though none of the acts contemplated are. Where are the limits to the broad proposition announced by Gibson, J.,¹ in a case involving the combination of employers to depress the wages of journeymen: "A combination is criminal when the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates?" Such definition may be sufficient for the civil court in passing upon the validity of agreements creating or furthering such combinations; but a man's liberty should not turn upon a court's discretion, whim or fancy. Is it at all likely that any two judges would agree whether a given combination has a "necessary tendency" to prejudice the public, or to "oppress" individuals, by "unjustly subjecting" them to the power of the confederates? The definition makes a combination that is contrary to public policy a crime.²

unjustly to affect the body politic; and 3d. Confederacies which, from the mode of their operation, exhibit the features of various false devices and tokens, or an aggravation of violence likely to overbear individual resistance and to produce public terror. And this is virtually saying that in the first case the confederacy is unlawful because it is a cheat at common law, and the second, because it is an attempt to obstruct justice, and the third case, because it is an attempt at riot." Wharton's American Criminal Law (9th ed.), vol. II, chapter Conspiracy, § 1338.

¹ Com. v. Carlisle, Brightly's Rep. 36.

² The supreme court of Illinois, in *Smith v. People*, 25 Ill. 17, held that a combination to seduce a female was a criminal conspiracy, although seduction was not an offense at the common law. The facts were such as to appeal to a court and lead it astray. The court said (p. 23):

"To attempt to define the limit or

extend the law of conspiracy, as deducible from the English decisions, would be a difficult if not impracticable task, and we shall not attempt it at the present time. We may safely assume that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means. In the former case it is not necessary to set out the means used, while in the latter it is, as they must be shown to be unlawful. But the great uncertainty, if we may be allowed the expression, is as to what constitutes an unlawful end, to conspire to accomplish which is indictable without regard to the means to be used in its accomplishment. And again, what means are unlawful to accomplish a purpose not in itself unlawful? As this indictment falls under the first class, we shall confine ourselves to that. If the term 'unlawful' means criminal, or an offense against the crimi-

§ 355. Criminal intent.— A crime is not complete without a criminal intent, either expressed or implied from criminal negligence. In a combination to do that which is not criminal by means which are not criminal, wherein is the criminal intent found? The intent is to accomplish a certain object by certain means; it is quite likely that such intent was defined in the minds of one or more individuals before co-operation was suggested; the co-operation is but an additional (and *per se* legal) means to accomplish the end in view; no new intent intervenes; the object remains the same; the means to be used to attain the object remain the same; co-operation simply facilitates. At what moment do the intentions of the individuals become criminal by their agreeing to co-operate? If, as is universally held, the combination be the gist of the offense, the crime, then the criminal intent is found in the individuals who harbor such intent prior to the formation of the combination. The combination itself has no criminal intent, inasmuch as the ends in view are not criminal. The crime is complete with the formation of the combination, with the agreement to co-operate to accomplish the end in view. The criminal intent,

nal law, and as such punishable, then the objection taken to this indictment is good, for seduction by our law is not indictable and punishable as a crime. But by the common law governing conspiracies the term is not so limited, and numerous cases are to be found where convictions have been sustained for conspiracies to do unlawful acts, although those acts are not punishable as crimes. Nor yet would it be quite safe to say that the term 'unlawful' as here used includes every act which violates the legal rights of another, giving that other a right of action for a civil remedy. And we are not prepared to say where the line can be drawn. It is sufficient for the present case to say that conspiracies to accomplish purposes which are not by law punishable as crimes, but which are unlawful as violations of the rights of individ-

uals, and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society, by giving exemplary damages beyond the damages actually proved, have in numerous instances been sustained as common-law offenses. The law does not punish criminally every unlawful act, although it may be a grievous offense to society. And in determining what sort of conspiracies may or may not be entered into without committing an offense punishable by the common law, regard must be had to the influence which the act, if done, would actually have upon society, without confining the question to the inquiry whether the act might itself subject the offender to criminal punishment."

which is the essential element of all crimes, must of course precede by a logical, even though by an inappreciable, interval, the commission of the offense. There is nothing so inherently reprehensible in co-operation as to make the mere intent to combine, regardless of the purposes of the combination, criminal; and if the purposes of the combination are taken into consideration it is difficult to see how the intent to combine can be held criminal if the objects contemplated are in no sense criminal. An intent cannot be criminal unless it relates in some manner to the commission of a criminal offense; the criminal object or purpose must be present and ascertainable before the element of criminality can be found in the intent.

§ 356. **Legislative definition.**—It is the province of the legislature to define, within constitutional limitations, what are crimes and misdemeanors. The legislature may say that a combination to do that which is not criminal, but which is immoral or oppressive, is a misdemeanor; or the legislature may say that a combination to do that which is innocent by immoral or oppressive but not criminal means is a misdemeanor; and every man will know what is and what is not criminal. The courts left the law of conspiracy in such confusion in the state of New York that the legislature defined the offense and specifically provided that “No conspiracies, other than such as are enumerated, are punishable criminally,” thereby limiting the power of the courts to hold criminal combinations for the purposes, but leaving the courts unfettered as regards enforcing contracts creating or affecting injurious combinations.¹

§ 357. Most of the states have statutes defining conspiracy, but in many of the states the courts enforce not only the statutory offense, but still continue to exercise a wide discretion and hold many combinations criminal under the common law, though neither the means nor the ends are criminal.²

¹ In this connection see *Adams v. People*, 9 Hun. 89; *Van Marter v. Babcock*, 23 Barb. 633; *People v. Chase*, 16 Barb. 495; *March v. People*, 7 Barb. 391; *Woodward v. Vandewater*, 4 Denio, 349, 353; *People v. Fisher*, 14 Wend. 15; *People v. Brady*, 56 N. Y. 190.

² Mr. Wright sums up his investigation of the law of criminal conspiracy as follows: “It is conceived that on a review of all the decisions there is a great preponderance of authority in favor of the proposition that, *as a rule*, an agreement or combination is not criminal unless it be for acts or omissions (whether as ‘ends’ or as ‘means’) which would be criminal apart from agreement (see esp. 1725, Edwards; 1788, Fow-

§ 358. Under section 5440 of the Revised Statutes of the United States greater protection to the individual is guaranteed by the provision that all parties to a conspiracy are liable only when "one or more of such parties do any act to effect the object of the conspiracy."¹

ler; 1811, Turner; 1834, Seward); and that the modern law of conspiracy is in truth merely an extension of the law of attempts, the act of agreement for the criminal purpose being substituted for an actual attempt as the overt act. It has been seen by what steps a beneficial exception has established itself in the case of agreements to defraud, and how the ancient crime of conspiracy, properly so called, has been extended to charges of any kind of crime made for purposes of extortion. Probably also in the case of agreements 'directly of a public nature and leveled at the government,' and perhaps in the case of agreements to pervert or defeat justice, the law of criminal combination has gone somewhat beyond the bounds of the ordinary criminal law. In the case of agreements to injure private persons, the balance of decisions seems to incline against any such extension, though expressions of opinion occur in favor of the possibility of such an extension in cases still to be defined. In the case of agreements to coerce a master or workmen in the conduct of his business or in the disposal of his industry, there seems to be recent authority in favor of such an extension, but it has not yet been placed beyond doubt by number of cases or by the authority of the court of appeal; and it has been seen that there is much difficulty in finding authority for such an extension in the common law before the present century. Expressions of great apparent generality, as to the criminality of combinations in cases not within any of

these particular lines of extension, occur in some of the reports; but they will be found nearly always to have been used with reference either to cheats or to the perpetually recurring question, what is the gist of a conspiracy for purposes of pleading? and to have had for the most part a totally different meaning from that which they seem to import when they are cited apart from their context." Wright, *Crim. Consp.*, p. 48.

¹ "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than \$10,000; or to imprisonment of not more than two years, or to both fine and imprisonment, in the discretion of the court." Under above, see *United States v. Boyden* (1868), 1 Low. 266; *United States v. Donau* (1873), 11 Blatchf. 168; *United States v. De Grief et al.*, 16 Blatchf. 21; *United States v. Fehrenback* (1875), 2 Woods, 175, 197; *United States v. Denee et al.*, 3 Woods, 47; *United States v. McKee*, 4 Dill. 128; *United States v. Crafton et al.*, 4 Dill. 145; *United States v. Walsh*, 5 Dill. 58; *United States v. Miller*, 3 Hughes, 553; *United States v. Hirsh* (1879), 100 U. S. 33; *United States v. Bauer et al.*, 4 Dill. 407; *United States v. Sacia et al.* (1880), 2 Fed. R. 754; *The Mussel-Slough Case* (1881), 5 Fed. R. 680; *United States v. Sanche* (1881), 7 Fed. R. 715; *United States v. Watson* (1883), 17 Fed. R. 145; *United States*

§ 359. Crime of conspiracy complete with combination.—

Whether the definition of criminal conspiracy be strict or loose, there is no doubt that the offense is complete with the combination, except where it is provided by statute that in addition to the combination there must be proof of some overt act. The combination being the gist of the offense, the latter cannot be proven without affirmative evidence of the combination. Proof of acts done in furtherance of the objects of the conspiracy may have a certain force as evidence of the existence of the conspiracy, but such proof is not in itself conclusive.¹ Except where otherwise provided by statute, it is not material that the unlawful purpose should be accomplished, or even that any act should be done tending toward its accomplishment.² Wherever it is required by statute that some overt act be affirmatively shown, such overt act must be charged in the indictment and proven on the trial.³ But the overt act need not be set forth with great particularity. Where there has been no change of the common law and the proof of some overt act is not required, it is not necessary to set forth in the indictment, or prove upon the trial, either the accomplishment of any of the objects of the conspiracy, or any acts in furtherance of such objects.⁴

v. Gordon (1884), 22 Fed. R. 250; *In re Wolf* (1886), 27 Fed. R. 606; *United States v. Frisbie* (1886), 28 Fed. R. 808; *United States v. Britton* (1883), 108 U. S. 199, 2 Sup. Ct. R. 531.

¹ *Territory v. Turner*, 37 Pac. R. 368; *People v. Bricknell*, 15 N. Y. Supp. 528.

² *State v. Cawood* (1830), 2 Stew. (Ala.) 360; *Medley v. People* (1892), 49 Ill. App. 218; *State v. Norton* (1850), 23 N. J. Law (3 Zab.), 33; *State v. Brady* (1890), 107 N. C. 822, 13 S. E. R. 325.

³ *Dealy v. United States* (1894), 152 U. S. 539, 14 Sup. Ct. 680; *Bannon v. United States* (1895), 156 U. S. 464, 15 Sup. Ct. 467; *United States v. Benson* (1895), 70 Fed. R. 591; *United States v. Boyden* (1868), Fed. Cas. No. 14,632, 1 Low. 266; *United States v. Dustin* (1869), Fed. Cas. No. 15,011, 2 Bond. 332; *United States v. Donau* (1873),

Fed. Cas. No. 14,983, 11 Blatchf. 168; *United States v. Blunt* (1875), Fed. Cas. No. 14,615, 7 Chi. Leg. News, 258; *United States v. Walsh* (1878), Fed. Cas. No. 16,636, 5 Dill 58; *United States v. Watson* (1883), 17 Fed. R. 145; *United States v. Reichert* (1887), 32 Fed. R. 142; *United States v. Sanche* (1881), 7 Fed. R. 715; *United States v. Milner* (1888), 36 Fed. R. 890; *United States v. Gardner* (1890), 42 Fed. R. 829.

⁴ *Miller v. State* (1881), 79 Ind. 198; *Com. v. Judd* (1807), 2 Mass. 329; *Com. v. Davis* (1812), 9 Mass. 415; *Com. v. Eastman* (1848), 55 Mass. (1 Cush.) 189; *Com. v. Fuller* (1882), 132 Mass. 563; *People v. Arnold* (1881), 46 Mich. 268, 9 N. W. R. 406; *State v. Straw* (1861), 42 N. H. 393; *People v. Chase* (1853), 16 Barb. 495; *People v. Squire* (1888), 20 Abb. N. C. 368; *Clary v. Com.* (1846), 4 Pa. St. (4 Barr), 210;

§ 360. Conspiracies to do that which is not criminal.—

While the proposition has been strenuously urged that only those conspiracies are criminal which contemplate, either as means or ends, some criminal object, it is our duty to set forth impartially the law as laid down by the various courts. The following combinations to accomplish purposes not in themselves criminal have been held criminal conspiracies:

To obstruct the business of a canal company by constructing a bridge across the canal.¹ By employers to depress the wages of journeymen.² By members of a typographical union to compel their employers to make the office a union office.³ By employees to foment a strike.⁴ By railway employees to compel the company to sever relations with a third company.⁵ By journeymen bootmakers to compel other journeymen to join their society; and to compel masters to employ none but members.⁶ By striking journeymen adopting rules which would injuriously affect other workmen and employers.⁷ By striking journeymen to compel by overt acts other workmen to conform to rules established by them.⁸ By two or more persons to "boycott" another.⁹ By laborers to effect a strike for an object other than to maintain or advance rate of wages.¹⁰ By persons to cause the discharge of an employee by threatening the employer.¹¹ By workmen to quit their employer in a body unless certain other workmen are dismissed.¹² By striking laborers to prevent the exercise of a lawful calling by another, or to injure trade.¹³ By strikers to drive away and prevent a "scab" from working within a certain district.¹⁴ By persons to prevent a corporation

Com. v. Hadley (1889), 13 Pa. Co. Ct. R. 188; State v. Noyes (1853), 25 Vt. 415.

¹ People v. Petheran (1887), 64 Mich. 252, 31 N. W. R. 188.

² Com. v. Carlisle (1821), Brightly, N. P. 36.

³ Crump v. Com. (1888), 84 Va. 927, 6 S. E. R. 620, 10 Am. St. R. 895.

⁴ United States v. Stevens (1877), Fed. Cas. No. 16,392, 2 Hask. 164.

⁵ United States v. Cassidy (1895), (D. C.) 67 Fed. R. 698.

⁶ Com. v. Hunt (1840), 4 Met. 111.

⁷ People v. Melvin (1810), 2 Wheeler, Cr. Cas. 262.

⁸ People v. Fisher (1835), 14 Wend. 9, 28 Am. Dec. 501.

⁹ People v. Wilzig (1886), 4 N. Y. Cr. R. 403.

¹⁰ People v. Smith (1887), 10 N. Y. St. R. 730.

¹¹ State v. Glidden (1887), 55 Conn. 46, 8 Atl. R. 890.

¹² State v. Donaldson (1867), 32 N. J. Law (3 Vroom), 151, 90 Am. Dec. 649; People v. Smith (1887), 10 N. Y. St. R. 730.

¹³ People v. Smith, *supra*.

¹⁴ People v. Walsh (1888), 15 N. Y. St. R. 17.

from employing certain others; or to drive certain persons from the employment of a corporation by intimidation.¹

In addition to the foregoing illustrations there might be cited a large number of cases in which the courts have held that conspiracies to defraud others of their property are criminal conspiracies, even though the means to be used and the objects to be accomplished are not in themselves crimes or obnoxious to the common law.²

§ 361. Merger of the conspiracy.—Where the conspiracy results in the actual commission of an offense greater in character than the conspiracy itself, the offense of conspiracy may be merged, as, for instance, a conspiracy to commit a felony is merged in the commission of the offense.³ But a conspiracy to commit a misdemeanor is not, generally speaking, merged in the commission of the offense.⁴

§ 362. Parties liable to prosecution.—All parties to a criminal conspiracy are subject to indictment and prosecution, and each member of a conspiracy is responsible for every act of every other member done in furtherance of the illegal purpose.⁵

¹ *State v. Stewart* (1887), 59 Vt. 273, 9 Atl. R. 559, 59 Am. R. 710.

² *Com. v. Warren* (1809), 6 Mass. 74; *Lambert v. People* (1827), 7 Cow. 166; *United States v. Spalding* (1835), Fed. Cas. No. 16,364, 4 Cranch (C. C.), 616; *Miller v. People* (1896), 22 Colo. 530, 45 Pac. R. 408; *Johnson v. People* (1859), 23 Ill. (12 Peck), 314; *Musgrave v. State* (1892), 133 Ind. 297, 32 N. E. R. 885; *State v. Mayberry* (1859), 48 Me. 218; *State v. Buchanan* (1821), 5 Har. & J. 317; *Com. v. Judd* (1807), 2 Mass. 329; *People v. Richards* (1849), 1 Mich. (1 Man.) 216; *People v. Clark* (1862), 10 Mich. 310; *People v. Watson* (1889), 75 Mich. 582, 42 N. W. R. 1005; *State v. Burnham* (1844), 15 N. H. 396; *State v. Rickey* (1827), 9 N. J. Law (4 Halst.), 293; *State v. Cole* (1877), 39 N. J. L. (10 Vroom), 324; *In re Roget* (1817), 2 City H. Rec. 61.

³ *Com. v. Blackburn* (1863), 62 Ky. (1 Duv.) 4; *State v. Mayberry* (1859), 48 Me. 218; *Com. v. Kingsbury* (1809), 5 Mass. 106; *Com. v. O'Brien* (1853), 66

Mass. (12 Cush.) 84; *People v. Richards* (1849), 1 Mich. (1 Man.) 216; *People v. Mather* (1830), 4 Wend. 229; *People v. McKane* (1894), 28 N. Y. Supp. 397, 81 Abb. N. C. 176; *Com. v. Delaney* (1855), 1 Grant Cas. (Pa.) 224.

⁴ *United States v. McDonald* (1876), Fed. Cas. No. 15,670, 3 Dill. 545; *State v. Murphy* (1844), 6 Ala. 765, 41 Am. Dec. 79; *State v. Murray* (1838), 15 Me. (3 Shep.) 100; *State v. Mayberry* (1859), 48 Me. 218; *People v. Richards* (1849), 1 Mich. (1 Man.) 216; *People v. Mather* (1830), 4 Wend. 229, 21 Am. Dec. 122; *Com. v. McGowan* (1848), 2 Pars. Eq. Cas. 841; *Com. v. Delaney*, 1 Grant Cas. 224; *State v. Setter* (1889), 57 Conn. 461, 18 Atl. R. 782, 14 Am. St. R. 131; *State v. Noyes* (1853), 25 Vt. 415.

⁵ *United States v. Mitchell* (1871), Fed. Cas. No. 15,790, 1 Hughes, 439; *United States v. Babcock* (1876), Fed. Cas. No. 14,487, 3 Dill. 581; *United States v. Butler* (1877), Fed. Cas. No.

§ 363. Criminal liability of parties to modern combinations.—From the foregoing considerations it is apparent that the law as interpreted by the various courts is in a state of no little confusion. If the term “unlawful” is used in its broadest significance, and a combination to do that which is unlawful by lawful means, or that which is lawful by unlawful means, be held to be a criminal conspiracy, then all parties to combinations held illegal for any reason are subject to indictment and conviction as parties to a criminal conspiracy.

Many cases have been cited wherein parties to combinations to defraud and to injure others in their property rights have been convicted as conspirators, although the purposes and objects contemplated were in no sense criminal. Ways of defrauding, oppressing and injuring others in their property rights are almost infinite, and if it is to be held broadly that every combination to injure, oppress or defraud in any one or more of these almost infinite ways amounts to a criminal conspiracy, it is hardly conceivable how any illegal combination can escape being held to be a criminal conspiracy. Given a combination which contemplates as means or ends unlawful objects, and which is therefore illegal because of such unlawful purposes, it is the very subtlety of refinement to attempt to split up the term “unlawful” and differentiate various degrees of unlawfulness, and to say that one object (not in itself criminal) is of such a degree of unlawfulness that a combination to attain it amounts to criminal conspiracy, whereas another object (not in itself criminal) is of such a different kind or sort of unlawfulness that a combination to attain it does not amount to a criminal conspiracy.

These predicaments result from that line of decisions which holds that a combination may be criminal although its purposes and objects are not criminal. Under the strict definition of a criminal conspiracy hereinbefore suggested, no such difficulties arise, since the criminality of a given combination would be tested entirely by the character of its purposes and objects.¹

14,700, 1 Hughes, 457; United States v. Cassidy (1895) (D. C.), 67 Fed. R. 698. C. L. (1872), p. 401: ‘A conspiracy is an agreement by two persons or

¹“By the common law as it is interpreted in Canada, according to a recent Canadian work, Clarke’s more, to do, or cause to be done, an act prohibited by penal law, or to prevent the doing of an act or-

C. THE LAW OF CIVIL CONSPIRACY.

§ 364. The law of civil¹ conspiracy is a wider development and application of the law of criminal conspiracy. So far as rights and remedies are concerned, all criminal conspiracies are embraced within civil conspiracies — the definition of the latter embraces the former. The definition hereinbefore given (section 171), and restated here for convenience, embraces all conspiracies, both civil and criminal.

§ 365. **The elements of a conspiracy.**—The elements of a conspiracy are:

(a) *The confederating* — the combining together of two or more persons.

(b) *The intent* — for the purpose.

(c) *The object* — of doing something unlawful, or oppressive, or immoral, as a means or an end.

daind under legal sanction by any means whatever; or to do, or cause to be done, an act, whether lawful or not, by means prohibited by penal law.' (Cites *R. v. Roy*, 11 L. C. J. 93, per Drummond, J.) In the Scotch common law conspiracy appears to be a general criminal title, but in practice to hold a less prominent place than it holds in English law. Prosecutions seem to have been instituted in Scotland against workmen for combination between 1790 and 1800, but in 1808 a majority of the judges held that a combination to raise wages was not punishable at common law. The history of the cases which followed, and which seem to have established firstly that combinations to coerce employers or workmen were punishable when accompanied with violence, and ultimately that they were punishable even in the absence of violence, will be found in the fifth Report of the Select Committee (H. C.) of 1824, on *Artisans and Machinery*, p. 489. These decisions were based, not on any supposed ancient precedents or rules of law, but on the principle that

the common law of Scotland is expansive." See Wright, *Crim. Consp.*, p. 62.

¹In *Landers v. Staten Island Ry. Co.*, 53 N. Y. 450, the court said: "The terms 'civil' and 'criminal,' when used, whether in reference to jurisdiction or judicial proceedings generally, have respect to the nature and form of the remedy and the cause of action or occasion for instituting legal proceedings. Civil stands for the opposite of criminal, and hence we have courts known as courts of civil jurisdiction and of criminal jurisdiction, distinguished by the character of the prosecutions in each. A civil action is brought to recover some civil right, or to obtain redress for some wrong, not being a crime or misdemeanor, and is thus distinguished from a criminal action or prosecution. A criminal action is a prosecution in a competent court of justice in the name of the government for the punishment of a crime, and a civil action is one prosecuted for the redress of an injury or the prosecution of a wrong."

§ 366. The conspiracy is complete when two or more combine together for the purpose of doing something unlawful, oppressive or immoral as a means or an end.¹

§ 367. In civil action damages constitute an essential element.—In a criminal prosecution, except where it is provided otherwise by statute, proof of the conspiracy is sufficient, and it is unnecessary to either charge in the indictment or prove on the trial that any act was done in furtherance of the conspiracy.

On the civil side, the mere proof of the combination is not sufficient to sustain an action for damages caused by a conspiracy. The mere act of combination, though amounting to a conspiracy, does not furnish ground for civil action in the absence of damages to the parties seeking to maintain the action.²

If any damage is sustained in consequence of the unlawful

¹ "In the earlier periods of the history of English law it was thought essential for conspiracy (properly so called) that the purposes of the combination should have been so far executed as that the person against whom the conspiracy was directed should have been actually indicted and put in peril. But it was held in 1354 (Anon.), in a case of combination for maintenance, that it was not essential that any suit should have been actually maintained; and in 1574 (Sydenham), in a case of conspiracy proper, that indictment would lie although the grand jury had ignored the bill against the prosecutor; and the Poulterers' Case established or gave rise to the doctrine that the combination for any crime was punishable, although the purpose had not been commenced to be put in execution otherwise than by the act of agreement itself; and although this rule was at first occasionally doubted (*e. g.*, Daniell, 1704; Spragg, 1760), it has long been established that no overt act is in general necessary in conspiracy beyond the agreement

itself. This doctrine was applied to treason-felony in *Mulcahy's Case* (1868), which contains a history of the growth of the rule in its application to treason." Wright, Cr. Consp., p. 54. See also *People v. Fisher*, 14 Wend. (N. Y.) 9; *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; *Collins v. Com.*, 3 S. & R. (Pa.) 220; *Com. v. Hunt*, 4 Met. 111; *Hazen v. Com.*, 23 Pa. St. 355; *Heine v. Com.*, 91 Pa. St. 145; *Alderman v. People*, 4 Mich. 414; *State v. Burnham*, 15 N. H. 396; *Isaacs v. State*, 48 Miss. 234; *People v. Geiger*, 49 Cal. 648; *State v. Sterling*, 34 Iowa, 443; *Johnson v. State*, 3 Tex. App. 590; *State v. Noyes*, 25 Vt. 415; *State v. Straw*, 42 N. H. 393. See also *Spies et al.* (anarchist case — 1887), 122 Ill. 1.

² *Herron v. Hughes* (1864), 25 Cal. 555; *Doremus v. Hennessy* (1895), 62 Ill. App. 391; *Kimball v. Harman* (1871), 34 Md. 407; *Robertson v. Parks* (1892), 76 Md. 118, 24 Atl. R. 411; *Stevens v. Rowe* (1880), 59 N. H. 578, 47 Am. R. 231; *Bayles v. Vanderveer* (1895), 32 N. Y. Supp. 1117.

combination an action lies even though the object of the conspiracy was not attained.¹

Before a private party can maintain an action on the case against the parties to a combination for conspiracy, he must have been damaged, troubled or inconvenienced in such a manner and to such an extent as to warrant a monetary compensation.²

§ 368. *The confederating.*—To show conspiracy it is not necessary to prove an express compact or agreement among the parties thereto. The essential element of the charge is the common design; but it need not appear that the parties met together either formally or informally and entered into any explicit or formal agreement; nor is it essential that it should appear that either by words or writing they formulated their unlawful objects. It is sufficient that two or more persons in any manner either positively or tacitly come to a mutual understanding that they will accomplish the unlawful design. And any one, after a conspiracy is formed, who knows of its existence and purposes and joins therein, becomes as much a party thereto from the time of his joining as if he had been an original member.³

Where a combination or association is innocent in its inception, but is afterwards perverted to unlawful ends, only those participating in the perversion are held to be conspirators.⁴

§ 369. *The intent.*—The intent is a vitally essential element. There can be no conspiracy without a purpose, express or implied, to do something unlawful, oppressive or immoral as a means or an end;⁵ and before parties can be convicted or agree-

¹ *Patten v. Gurney* (1821), 17 Mass. 182.

² *Doremus v. Hennessy* (1895), 62 Ill. App. 391; *Patten v. Gurney* (1821), 17 Mass. 182, 9 Am. Dec. 141; *Swan v. Saddlemire* (1832), 8 Wend. 676; *Eason v. Petway* (1834), 18 N. C. (1 Dev. & B.) 44; *Bradley v. Pierson* (1892), 148 Pa. St. 502, 24 Atl. R. 65.

³ *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States v. Cassidy et al.*, 67 Fed. R. 698; *United States v. Rindskopf* (1874), Fed. Cas. No. 16,165, 6 Biss. 259; *Connor v. Peo-*

ple (1893), 18 Colo. 373, 33 Pac. R. 159, 36 Am. St. R. 295; *McKee v. State* (1887), 111 Ind. 378, 12 N. E. R. 510; *In re Storm* (1816), 1 City H. Rec. 169; *In re McDermut*, 4 City H. Rec. 12; *Com. v. Manson* (1833), 2 Ashm. 31; *Com. v. Irwin*, 8 Phila. 380; *Com. v. Kirkpatrick* (1858), 15 Legal Int. 268; *Lowery v. State* (1867), 30 Tex. 402; *Johnson v. State* (1878), 3 Tex. App. 590; *Woodworth v. State* (1886), 20 Tex. App. 375.

⁴ *Com. v. Hunt*, 4 Met. 111.

⁵ The crime does not consist in the

ments pronounced void as in support of a conspiracy, the element of wrongful intent must be as fully proven as the element of confederating.

The evidence need not be direct; it may be indirect and circumstantial; but it must bear upon the time and the purpose of the combination, and must tend to show that the combination was for an unlawful purpose. A combination lawful in its inception is not rendered unlawful because some or all of its members put it to an unlawful use. Contracts or agreements in support of a combination lawful in its inception are not rendered invalid because the combination is perverted by some or all of its members. The law will not go back of the time of the perversion, but will rather treat the perversion as a conspiracy distinct from the original combination.

These propositions are of importance as applied to modern industrial and labor combinations, for it is not only conceivable, but a matter of frequent occurrence, that combinations are formed the objects of which are entirely lawful, and many contracts and agreements entirely legal are entered into in support of such combinations, but in time the combinations are perverted to unlawful purposes, and the original agreements and contracts are challenged as in support of a conspiracy.

§ 370. The object.—It is, of course, impossible to prove an intent without proving the thing intended, and in conspiracy the act—the object—must be of an unlawful, immoral or oppressive character. Whether the proof be direct or circumstantial it must show what was the purpose of the combination. Nothing may have been done in furtherance of the conspiracy, but the act that was contemplated must be shown. No combination becomes a conspiracy until an unlawful, immoral or oppressive act becomes the ultimate or incidental object of the combination. The mere fact that a partnership, a corporation or an association does something that is unlawful does not stamp the combination a conspiracy. Not a day passes that combinations of all kinds are not before the courts—princi-

mere combination; but where to this is added an illegal object, then it becomes criminal; and where neither the conspiracy, nor the object to be attained, is unlawful, but the means by which it is to be executed are criminal, then it is necessary to set out the means intended to be used, as a component part of the offense. *People v. Richards & Pelton* (1849), 1 Mich. 224.

pally in actions on the case for damages — charged with unlawful or oppressive acts, but seldom is it urged that the combination was formed for the express purpose of doing the thing complained of and was therefore a conspiracy.

It is an extremely hazardous inference to say that, because a combination does that which is unlawful, it must have been organized for such purpose, and is illegal from its inception.

The connection between the oppressive or unlawful acts complained of and the original objects of the combination should be clearly established before courts declare all contracts and agreements in support of the original combination invalid.

§ 371. Action on the case for damages occasioned by a conspiracy.— Whether a conspiracy be civil or criminal, if it occasions damage to a third party such party has his remedy in an action on the case. Action lies for conspiracy to maliciously prosecute, harass and defame.¹

§ 372. A conspiracy to force an employer into paying money that he is not legally bound to pay, by threats to induce his workmen to strike, is actionable; if such threats are carried out the employer may recover damages sustained.²

§ 373. Action will lie for conspiracy to drive a man out of business by fraudulent or malicious acts.³ And generally speaking, any conspiracy the object of which is to wrongfully or maliciously injure another in business, trade or reputation is actionable, and damages sustained may be recovered from the parties to such conspiracy.⁴

§ 374. Conspiracies among workingmen the objects of which are to coerce workingmen to become members of labor combinations and associations, and to interfere with the right of others to work, are actionable, and parties injured may recover damages.⁵ In this connection "boycotts," the object of which

¹ *Page v. Cushing* (1854), 38 Me. 523; *Dreux v. Domec* (1861), 18 Cal. 83; *Davenport v. Lynch* (1859), 51 N. C. (6 Jones' Law), 545; *Wildee v. McKee* (1886), 111 Pa. St. 335, 2 Atl. R. 108, 56 Am. R. 271; *Phelps v. Goddard* (1801), 1 Tyler, 60, 4 Am. Dec. 720; *Kirtley v. Deck* (1811), 2 Munf. 10, 5 Am. Dec. 445; *Smith v. Nippert* (1890), 76 Wis. 86, 44 N. W. R. 846.

² *Carew v. Rutherford* (1870), 106 Mass. 1, 8 Am. R. 287.

³ *Van Horn v. Van Horn* (1890), 52 N. J. Law, 284, 20 Atl. R. 485.

⁴ *Jones v. Baker* (1827), 7 Cow. 445; *Murray v. McGarigle* (1887), 69 Wis. 483, 34 N. W. R. 522; *Old Dominion S. S. Co. v. McKenna* (1887) (C. C.), 30 Fed. R. 48.

⁵ *Farmers' Loan & Trust Co. v.*

is to coerce employers into paying certain rates of wages or yielding to terms dictated, are actionable conspiracies.¹

§ 375. All parties to a conspiracy to cheat or defraud a third party are liable for all damages sustained as result of the operation of the conspiracy.² But, as already stated, the damage is the element which gives the right of civil action. In the absence of damage no action can be maintained.³

§ 376. Parties liable.—All parties to a conspiracy are jointly and severally liable for damages occasioned by the wrongful combination;⁴ and one who comes into the conspiracy after its organization becomes liable for all that has been previously done by the parties thereto;⁵ and acts done by any one of the conspirators in furtherance of the common object become the acts of all.⁶

Northern Pac. R. Co. (1894) (C. C.), 60 Fed. R. 803; Old Dominion S. S. Co. v. McKenna (1887) (C. C.), 30 Fed. R. 48; Sherry v. Perkins (1888), 147 Mass. 212, 17 N. E. R. 307; Mapstrick v. Ramge (1879), 9 Neb. 390, 2 N. W. R. 739; Perkins v. Rogg (1892) (Super. Ct. Cin.), 28 Wkly. Law Bul. 32.

¹Old Dominion S. S. Co. v. McKenna (1887), 30 Fed. R. 48; Casey v. Cincinnati Typographical Union No. 3 (1891), 45 Fed. R. 135; Toledo, A. A. & N. M. Ry. Co. v. Penna. Co. (1893), 54 Fed. R. 730; Jackson v. Stanfield (1894), 137 Ind. 592, 36 N. E. R. 345, 23 L. R. A. 588. And see generally in this connection Bohn Mfg. Co. v. Hollis (1893), 54 Minn. 223, 55 N. W. R. 1119, 40 Am. St. R. 319; Ryan v. Burger & Hower Brewing Co. (1891), 59 Hun, 625, 13 N. Y. Supp. 660; Parker v. Bricklayers' Union No. 1 (1889), 21 Wkly. Law Bul. 223; Lucke v. Clothing Cutters' & Trimmers' Assembly (1893), 77 Md. 396, 26 Atl. R. 505, 39 Am. St. R. 421; Curran v. Galen (1892), 22 N. Y. Supp. 826; Mattison v. Lake Shore & M. S. Ry. Co. (1895) (Com. Pl.), 3 Ohio Dec. 526, 2 Ohio N. P. 276.

²Watts v. British & American Mortg. Co. (1894), 60 Fed. R. 485; Leavitt v. Gushee (1855), 5 Cal. 152; Gardner v. Preston (1805), 2 Day, 205, 2 Am. Dec. 91; Work v. McCoy (1893), 87 Iowa, 217, 54 N. W. R. 140; Page v. Parker (1861), 43 N. H. 363, 80 Am. Dec. 172; Percival v. Harres (1891), 142 Pa. St. 369, 21 Atl. R. 876; Bean v. Bean (1815), 12 Mass. 20; Adams v. Paige (1829), 24 Mass. (7 Pick.) 542; Brackett v. Griswold (1888), 14 N. Y. St. R. 449; Lee v. Taylor (1890), 56 Hun, 610, 11 N. Y. Supp. 131.

³See "Rights and Remedies," *infra*.

⁴Cheney v. Powell (1891), 88 Ga. 629, 15 S. E. R. 750; Jones v. Baker (1827), 7 Cow. 445; Buffalo Lubricating Oil Co. v. Standard Oil Co. (1887), 106 N. Y. 669, 12 N. E. R. 825; Cramer v. Hernstadt (1874), 41 Tex. 614; Page v. Parker (1861), 43 N. H. 363, 80 Am. Dec. 172.

⁵Hinchman v. Richie (1849), Brightly, 143; Freeman v. Stine (1877), 34 Leg. Int. 96.

⁶Page v. Parker (1861), 43 N. H. 363, 80 Am. Dec. 172; Warshauer v. Webb (1887), 9 N. Y. St. R. 529; Hinchman v. Richie (1849), Brightly, 143.

PART IV.

COMBINATIONS OF LABOR—LEGAL AND ILLEGAL.

CH. 10. COMBINATIONS OF CAPITAL AND LABOR BEFORE THE LAW.

11. COMBINATIONS OF LABOR IN ENGLAND.

12. COMBINATIONS OF LABOR IN THE UNITED STATES.

13. ILLEGAL COMBINATIONS OF LABOR.

CHAPTER 10.

COMBINATIONS OF CAPITAL AND LABOR BEFORE THE LAW.

§ 377. Illegal combinations of labor and capital.

378. Combinations of capital condemned, combinations of labor upheld.

379. Increase of wages means increase in cost and price.

380. Combinations of either capital or labor may be conspiracies.

381. Raising of either wages or prices not an unlawful object.

382-384. Bond of sympathy between combinations of labor and combinations of capital.

§ 377. **Illegal combinations of labor and capital.**—It will be convenient to consider combinations of labor and combinations of capital separately, but the law should and must finally be the same for both. At the present time the law is not the same. Neither legislatures nor courts treat combinations of capital and combinations of labor upon a plane of equality. This will become apparent as the cases are reviewed and the statutes summarized. The attitude of both legislatures and courts has changed greatly with the lapse of time. For some years there has been an increasing leniency toward combinations of labor, and of late an increasing severity toward combinations of capital. At no time have both stood upon a footing of equality. Politics, prejudice and sentiment have had and still have their effects. At the present moment the tendency is to view with suspicion all combinations of capital and at the same time look with favor upon all combinations of labor. The legislature which passes a law against combina-

tions of capital so sweeping in its terms as to overshoot the mark and embarrass the courts, also endeavors in a clumsy way to make legal combinations of labor and protect them from interference by the courts.

§ 378. Combinations of capital condemned, combinations of labor upheld.—As a matter of fact, at the present moment the law is that combinations of labor to raise wages are legal; while in many states combinations of capital to raise prices are not legal. For instance, the court of appeals of New York said:¹ “In the general consideration of the subject, it must be premised that the organization or the co-operation of workingmen is not against any public policy. Indeed, it must be regarded as having the sanction of the law when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate. It is proper and praiseworthy, and perhaps falls within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily.”

Here is first the specific approval of the very sound economic proposition “that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily;” second, the legal proposition that such a combination formed for the express purpose of raising wages is not only lawful but praiseworthy. Language to the same effect, and even stronger, in favor of the combinations of labor to raise wages is to be found in many of the cases hereinafter cited.

Compare the foregoing with the following propositions regarding combinations of capital formed for identically the same purpose, namely, to get better prices for what capital has to sell:

A combination organized for the purpose of controlling the price and regulating the production of a commodity of general use, such as candles, is contrary to public policy.²

In a case involving the validity of an association of wire-cloth manufacturers, the supreme court of New York said: “The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand,

¹Curran v. Galen et al. (1897), 152 N. Y. 83, 46 N. E. R. 297.

²Emery et al. v. Ohio Candle Co., 47 Ohio St. 320.

and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of competition. . . . Free competition is the life of business, and all combinations for the purpose of raising or controlling the prices of merchandise are monopolies, and intolerable, and ought to receive the condemnation of all courts.”¹

Extracts to the same effect will be found hereinafter and might be multiplied indefinitely.

§ 379. Increase of wages means increase in cost and price. Surely the first of necessities is labor; it enters into every product, and an increase of wages means an increase of cost and generally an increase of price.

All the employees engaged in the manufacture of candles or wire cloth may combine for the sole purpose of raising the price of labor, and the combination may, within lawful bounds, bring such pressure to bear upon the makers of candles or wire cloth as to accomplish its object. But the employers cannot combine to raise prices; cannot combine to meet the artificial conditions created by the combination of employees. The “underlying law that men should unite to achieve that which each by himself cannot achieve” seems to be a very one-sided law in its practical application — it favors labor and not capital.

The distinction is entirely arbitrary, and is a matter of politics and not a matter of either economy or logic. Many of the decisions about to be reviewed show that combinations of labor may be as oppressive and tyrannical as combinations of capital, or, on the other hand, both may be beneficial.

§ 380. Combinations of either capital or labor may be conspiracies.— A combination, whether of laborers or capitalists, may or may not be a conspiracy — it is a confederating together for certain purposes; whether it is legal or illegal depends upon its purposes and not upon its *personnel*. If the object of the combination is to do that which is unlawful, oppressive or immoral, it is an illegal combination no matter who compose it; if the object is to do that which is not unlawful, not oppressive, not immoral, either as a means or an end, then the combination is not illegal no matter who compose it.

¹De Witt W. C. Co. v. N. J. W. C. Co., 14 N. Y. Supp. 277; Richardson v. Buhl, 77 Mich. 632, 43 N. W. R. 1102.

§ 381. Raising of either wages or prices not an unlawful object.— Furthermore, it may be said here that neither the raising of wages, nor the raising of prices, is an object unlawful, oppressive or immoral in itself. On the contrary, every effort of an individual, or partnership, an association, a corporation or a combination to get better wages for its labor, or better prices for its products, is morally and economically sound and praiseworthy, provided the means used are not unlawful, immoral or oppressive. And in considering the character of the means used to accomplish the end, labor and capital must stand on a footing of absolute equality before the law. What is permitted to one must be permitted to the other; what is denied to the one must be denied to the other.

§ 382. Bond of sympathy between combinations of labor and combinations of capital.— At the present time there is perceptible a feeling of sympathy between the large labor organizations of the country and the large industrial combinations recently organized. It may be doubted whether the leaders of the large labor organizations are in sympathy with the popular outcry against trusts and combinations. They recognize the fact that a combination of capital may be not only a legitimate but possibly a necessary result of the combination of labor, and that the combination of the one is no more reprehensible than the combination of the other, provided both combinations keep within just and reasonable bounds. It is possibly also true that the shrewder of the labor leaders perceive that the methods pursued by combinations of capital toward would-be competitors and rivals are no more oppressive, unfair and illegal than are the methods pursued by labor unions toward non-union workers. Human nature is very much alike, and all combinations are prone to exercise whatever powers they possess in furtherance of their objects. The resources, powers and methods of labor unions, developed and exhibited on the occasion of every extensive strike, are by no means insignificant and puerile as compared with the methods of the most powerful capitalistic combination. It may be doubted whether either could give the other advice.

§ 383. There does not appear to be at the present time any strenuous opposition to combination of capital on the part of the principal labor organizations of the country; a truce seems to

have been declared. Nor is this condition of things at all unnatural. In fact, it is the logical result of the rapid growth of combination on both sides. Among the conditions which have led to more thorough organizations of capital are the increasing demands of organized labor. It is obviously impossible for isolated factories, or the factories in particular cities or particular sections, to yield to the demand for a ten-hour, or a nine-hour, or an eight-hour day at the same wages; or to the demand for increased wages; or, in short, to any demand of organized labor which will increase the cost of production, unless practically all the factories engaged in the same industry are successfully subjected to the same demand. Nearly all industries are conducted upon so close a margin between cost and price that even a very small increase in the cost of turning out the product must be accompanied by a corresponding increase in price, else the factories must be closed. In many trades — the building trades, for instance — the only associations or combinations that exist are for the sole purpose of resisting the increasing demands of labor unions. It is in the natural order of things that these associations for defense should lead up to combinations the object of which is to maintain the same margin of profit by increasing prices instead of resisting the demands of labor.

§ 384. The alliance which exists between many a large labor union and the combination which employs most of its members is often more real than apparent. In fact, it amounts to a tacit agreement on the part of the members of the labor union that they will not join in the hue and cry against the combination of capital, provided the combination of capital will accede to the demands of the union as to hours and wages. Each combination is afraid to destroy the other, since the destruction of the one should logically, and must inevitably in the long run, involve the destruction of the other.

CHAPTER 11.

COMBINATIONS OF LABOR IN ENGLAND.

§ 385. Development of the law concerning combinations of labor in England.

- 386. Early English statutes.
- 387, 388. Statutes of labor, 1349 and 1350.
- 389, 390. Statute of Henry VI., 1424.
- 391. Statute of 1548.
- 392. Statute of 1562.
- 393-395. Statutes of 1799 and 1800 against combinations to raise wages.
- 396, 397. Repealing act of 1824.
- 398, 399. Act of 1825.
- 400, 401. Trades Union Act, 1871.
- 402. Conspiracy and Protection of Property Act, 1875.
- 403. Progress of the law towards greater freedom for labor.
- 404-406. English cases and authorities.
- 407. Combination of coal miners, 1832.
- 408. Combination to strike — Picketing, 1847.
- 409. Combination to compel discharge of employee, 1851.
- 410. Combination of cotton spinners, 1856.
- 411. Combination of employees to coerce employers by oppressive means, 1859.
- 412. Combination of boiler-makers and ship-builders, 1867.
- 413. Combination of shoemakers, 1869.
- 414. Combination of employees of gas companies, 1872.

§ 385. Development of the law concerning combinations of labor in England.¹— The law regarding labor combinations has been and still is a matter of sharp and bitter controversy. As has been well remarked, the history of the law is extremely curious, and is connected with important periods of English history. The development has been slow, and within the past century has been along lines of greater freedom of action for labor.²

¹For extended discussions of the law of conspiracy as affecting labor combinations, see Stephen's *Hist. Crim. Law Eng.*, vol. III; Wright's *Crim. Consp.* (Carson's Ed.); Cook's *Trade & Labor Comb.*; Clifford Brigham in 21 *Am. Law R.* 41.

²"As might have been expected, there is no department of the law in which greater changes have taken place. When England was mainly a pastoral and agricultural country, and when commerce was still in its infancy, the trade offenses which in

§ 386. Early English statutes.— The early English statutes were conceived in a spirit diametrically opposed to modern notions. They were part and parcel of that erroneous economic notion that the law of demand and supply was subject to the superior power of parliament.¹

our days are most important were unknown; when there was no such thing as bankruptcy there could be no fraudulent bankrupts. On the other hand, proceedings which we now regard as the common course of business were treated as crimes. Usury, forestalling and regrating continued to be so regarded, at all events in theory, till very modern times. As time went on, and commerce became more and more important, the old view as to the criminality of usury died away, but the possibility of whole classes of frauds unknown in earlier and simpler times was proved by experience, and punishments were provided for them. Again, in early times it was thought both possible and desirable to provide by law for many matters connected with trade which we think it wiser to leave unregulated. Laws, for instance, were passed which prescribed the terms as to apprenticeship on which people should be permitted to work at given trades. This legislation came to be regarded as opposed to the principles of political economy, and it was abolished; but considerations not usually recognized or regarded with favor by political economists have induced the legislatures of our own times to pass a large number of acts regulating particular branches of trade and manufacture, and containing a greater or less number of penal clauses. Such in general is the nature of the offenses connected with trade.

“More particularly, they may be divided into three classes, which, if we take them according to the an-

tiquity of the roots from which they spring, are as follows:

“1. Offenses consisting in a supposed preference of private to public interest. These are usury, forestalling, and regrating, and conspiracies in restraint of trade.

“2. Offenses against laws regulating particular trades.

“3. Commercial frauds, and in particular the offenses of fraudulent debtors, and fraudulent officers of companies.” Stephen’s *History of the Criminal Law of England*, vol. III, pp. 192, 193.

¹ “In our own days, and indeed for nearly sixty years past, the doctrine that the wages of labor should be regulated by competition has been generally accepted and expressed by saying that there should be a free course of trade in labor. As is usual when the word ‘free’ is used it has meant different things to different people. In the mouths of employers, and those who sympathize with them, it has commonly meant ‘a course of trade free from pressure exerted by trade unions for the increase of wages.’ In the mouth of workmen, and those who sympathize with them, it has commonly meant ‘a course of trade free from all legal restrictions upon the operations of trade unions.’ In order to understand the law apart from all questions of sympathy, it is necessary to go back to very remote times, and to follow downwards a course of legislation arising out of views very different from our own.” Stephen’s *Hist. Crim. Law*, vol. III, p. 202.

“By the English statutes, from early times down to 1825, combina-

§ 387. Statutes of labor, 1349 and 1350.— These early statutes of labor¹ provided “that every man and woman of what condition he be, free or bond, able in body, and within the age of three score years,” and not having means of his own, “if he

tions of workmen and others formed for the purpose of raising or affecting the rate of wages, and, during the latter part of this period, combinations intended to compel employers to recognize and observe restrictions as to their business imposed by associations of workmen, and to compel other workmen to conform to the rules of trades unions, were illegal and criminal. Since 1800 the acts of threatening, intimidating, molesting and obstructing others in regard to their business and labor have also been illegal and criminal by statute. Since 1825 no statutory provision, such as existed before, declaring combinations for certain purposes to be illegal and criminal, has existed. A conspiracy at common law being a combination of two or more to effect an illegal purpose or to effect a legal purpose by illegal means, the illegality of such purpose or means may be found in either the statute or common law. Whatever the law which declares such a purpose or means to be illegal, the combination may be spoken of as a common-law conspiracy. The statute law of England, before 1825, said that the purpose of raising wages or coercing employers and fellow-workmen by means of combination was an illegal purpose. Since 1825 it has not said so, but has said that threatening, intimidating, molesting and obstructing others in their trade or business were illegal acts. The illegality of the purpose before 1825, and in the means since 1825, is to be found, therefore, in the statute law. But running down on a course parallel

with the development of the statute law are decisions and opinions, having the weight of high authority, which support the conclusion that the illegality of such purposes and means can also be found in their violation of the principles of the common law. The reasons why the common law condemns such purposes and means as illegal are variously stated to be: because in violation of personal rights and injurious to society; because the element of force of numbers working to effect such a purpose or to use such means gives to the purpose or means an illegality which otherwise would not be present; because they are in restraint of trade; and finally, because the coercive intent supplies the illegality. The course of the statute law supports this view of the existence of these common law principles, because since 1825 it has been found necessary to pass particular statutes in order to legalize such purposes and means. This is shown by the provisions of the act of 1825, allowing agreements as to the rate of wages to be demanded; those of 1859 legalizing peaceable persuasion of others to induce them to abstain from or cease working; those of 1871 providing that the purpose of a combination shall not, merely for the reason that it is in restraint of trade, be deemed illegal; and finally, those of 1875 saying that the test of the illegality of a combination is whether the acts to be done would be illegal if done by a single person. If it was necessary to pass these statutes in order to render such purposes legal,

¹ 23 Edw. 3, and 25 Edw. 3, St. 1.

in convenient service (his estate considered) be required to serve, he shall be bounden to serve him which so shall him require." They are to serve under pain of imprisonment; they are to take the customary rate of wages and no more. By the act of 1350 the wages of the most important classes of mechanics were fixed. A master carpenter was to have 3*d.* and a master free-mason 4*d.* a day from Easter to Michaelmas, "and from that time less, according to the rate and discretion of the justices." Strict provisions were made for the execution of the act.

The object was to check the rise in wages which naturally resulted from the ravages of the great pestilence called the "Black Death," and the attempt was made not only to regulate wages of laborers and mechanics, but to confine them to the specific localities where they resided. The statute provided: "If any of the said servants, laborers or artificers do flee from one county to another, because of this ordinance, that the sheriffs of the county where such fugitive persons shall be found shall do them to be taken at the commandment of the justices of the counties from whence they shall flee and bring them to the chief gaol of the same county, there to abide till the next sessions of the same justices."¹

§ 388. These early statutes of Edward III. remained in force in letter or spirit for more than two hundred years, being frequently confirmed and modified, and in many provisions very materially extended.² Wide authority was given to county

it must have been because by the common law they were illegal. If it be thought that the cases so interpreting the common law are not of much weight, it should be noted that they were considered sufficiently binding to require acts of parliament to counteract them. When such judges of England as Mansfield, Crompton, Brett, Bramwell, Erle and Coleridge have said, with full knowledge of the state of the statutes, that combinations for certain purposes were criminal conspiracies by the common law, to say that they meant that they were criminal because parliament had made such purposes criminal, is to attribute to them less

accuracy than is usually accorded." 21 Am. Law R., *supra*.

¹ It has been plausibly suggested that one of the objects of this remarkable legislation was to provide some sort of a substitute for the system of villeinage and serfdom which was then disappearing. See Nicholls' Hist. Poor Laws, 1, p. 45.

² See 12 Rich. 2, chs. 3-7, 9, 10 (1388); 7 Hen. 4, ch. 17 (1405); 2 Hen. 5, ch. 4 (1414); 6 Hen. 6, ch. 3 (1427) (this statute authorizes the justices in quarter sessions to fix the wages of artificers, and gives similar powers in towns to mayors and bailiffs); 6 Hen. 8, ch. 3 (1514).

and borough justices to execute these various laws with great rigor.

§ 389. Statute of Henry VI., 1424.— This early statute was aimed directly at labor organizations, the purposes of which were to evade the laws referred to in the last section. It provided that: "Whereas, by the yearly congregations and confederacies made by the masons in their general chapters and assemblies, the good course and effect of the statutes of laborers be openly violated and broken," the chapters should not be holden, those that cause them to be assembled and holden should be "judged for felons," and all masons coming to such congregations should be punished by imprisonment, fine and ransom.¹

§ 390. In considering these drastic attempts to regulate wages and control the freedom of labor, it must not be forgotten that during the same period the restraints laid upon the free exercise of business discretion by capital were in many instances quite as irksome. The law directed against the right of the laborer to get the best possible price for his labor were paralleled by the laws directed against the freedom of the capitalist to trade in the most profitable manner.

§ 391. Statute of 1548.²— This statute, more general in its terms, forbade all conspiracies and covenants of artificers, workmen or laborers, "not to make or do their work but at a certain price or rate," or for other similar purposes, under the penalty, on a third conviction, of the pillory and loss of an ear and to "be taken as a man infamous."

§ 392. Statute of 1562.³— This act repealed much of the early legislation and consolidated the law. It is entitled: "An act containing divers orders for artificers, laborers, servants of husbandry, and apprentices." Of this and subsequent acts Justice Stephen says: "It repeals many of the earlier provisions and contains a considerable number of enactments in favor of laborers and artificers. Its leading provisions in reference to the particular matter under consideration are as follows: All persons able to work as laborers or artificers, and not possessed of independent means or other employments, are bound to work as artificers or laborers upon demand. The

¹ Stephen's Hist. Crim. Law, *supra*. ² 5 Eliz., ch. 4.

³ 2 and 3 Edw. 6, ch. 15.

hours of work are fixed, power is given to justices in their next sessions after Easter to fix the wages to be paid to all mechanics and laborers, elaborate rules are laid down as to apprenticeship, and it is provided that for the future no one is to 'set up, occupy, use or exercise any craft, mystery or occupation now used,' in England or Wales, unless he is serving or has served an apprenticeship of seven years to it. This statute remained in force practically for a long period of time. It was not formally repealed till the year 1875. Throughout the whole of the seventeenth and the greater part of the eighteenth century no act was passed for the general regulation of trade and labor in any degree comparable to it in importance. A considerable number of acts, however, were passed bearing more or less on trade offenses. They were, for the most part, acts relating to particular trades, and prohibiting combinations in respect to the wages payable in those trades. Thus, for instance, in 1720 was passed¹ An act for regulating the journeymen tailors within the bills of mortality.' This act declared all agreements between journeymen tailors 'for advancing their wages or for lessening their hours of work' to be null and void, and subjected persons entering into any such agreement to be imprisoned with or without hard labor for two months. The hours of work were to be from 6 A. M. to 8 P. M., less an hour for dinner, and 'one penny halfpenny a day for breakfast.' The wages were to be any sum not exceeding two shillings a day from March 25th to June 24th, and for the rest of the year not exceeding one and eightpence. The courts of quarter sessions had power to regulate these rates, both as to time and as to wages. Similar enactments were passed with respect to the woolen manufacturers in 1725,² the hat trade in 1749,³ the silk weavers in 1777,⁴ and the paper trade in 1795.⁵ This last mentioned act fixes the hours of work at twelve, with one hour for refreshment. It says nothing as to wages, but enters much into detail as to the suppression of the combinations which it prohibits."⁶

¹ 7 Geo. 1, st. 1, ch. 18.

² 12 Geo. 1, ch. 34.

³ 22 Geo. 2, ch. 27.

⁴ 17 Geo. 3, ch. 55.

⁵ 36 Geo. 3, ch. 111.

⁶ Steph. Crim. Law of England, vol. III, p. 206.

§ 393. Statutes of 1799 and 1800 against combinations to raise wages.—An act was passed in 1799 for the purpose of suppressing all combinations by workmen to raise wages.¹ This act was repealed and replaced the year following;² but there was little difference between the two acts except that the repealing act contained clauses providing for the referring of differences between employers and employees to arbitration. This act of 1800, which remained in force until 1824, provided generally that all contracts theretofore entered into between journeymen manufacturers or other persons for obtaining an advance of wages for themselves or others, or for shortening hours of work or decreasing the quantity of work, should be void, except only contracts between any master and any journeyman as to the wages, etc., of that journeyman.

Further, that all contracts “for preventing or hindering any person from employing whomsoever he thinks proper, or for controlling or any way affecting any person carrying on any manufacture, trade or business, in the conduct or management thereof” should be void.

§ 394. That any journeyman who enters into any such contract is to be liable to imprisonment up to three months without hard labor, or two months with hard labor. And any journeyman or workman who “enters into any combination to obtain an advance of wages or to lessen or alter the hours of work, or for any other purpose contrary to the act; or who, by giving money or by persuasion, solicitation or intimidation, or any other means, wilfully and maliciously endeavors to prevent any unemployed person from taking service; or who, for the purpose of obtaining an advance of wages, or for any other purpose contrary to the provisions of the act, wilfully and maliciously induces, or tries to induce, any workman to leave his work; or who hinders any employer from employing any person as he thinks proper; or who being hired refuses without any just or reasonable cause to work with any other journeyman or workman employed or hired to work,” is subject to the same penalty.

Further, all persons attending meetings for any of the purposes declared to be illegal by the act, and all persons per-

¹ 39 Geo. 3, ch. 81.

² 40 Geo. 3, ch. 106.

suading people to attend such meetings, or collecting money in furtherance of such efforts, are subject to the same penalty.

The act further made it an offense to assist in maintaining men on a strike.

§ 395. These were known as the combination laws, and concerning them Justice Stephen remarks: "It is remarkable that in the parliamentary history for 1799 and 1800 there is no account of any debate on these acts, nor are they referred to in the Annual Register for those years. It is, however, obvious that whatever may have been the immediate occasion of the laws in question, they carried out and developed to their natural and legitimate conclusion a great mass of earlier legislation, going back to the Statute of Laborers, which again has relation to the still earlier period when a considerable part of the population were serfs. First, it is enacted that laborers and mechanics are to work at certain wages and to reside at certain places. In process of time this became inconsistent with the altered circumstances of society, and a system is substituted for it under which wages are still to be fixed, and all mechanics are to go through a regular apprenticeship for seven years, all the conditions as to the taking of apprentices being carefully regulated by act of parliament. Incidentally, combinations to raise wages are forbidden, but with no detail. This system also breaks down as new trades spring up, and numbers of workmen are collected in manufacturing towns and brought into a proximity to each other which cannot but make them feel their own power, and suggest to them that, as against their employers, they have common interests which may be promoted by combinations. The difficulties which arise from this conflict between the existing law and the new facts are at first provided for by particular statutes relating to particular trades. At last they are made the subject of a general act, which applies in the most detailed, specific, uncompromising way the principle upon which all the earlier legislation had depended. Workmen are to be contented with the current rate of wages, and are on no account to do anything which has a tendency to compel their employers to raise it. Practically, they could go where they pleased individually and make the best bargains they could for themselves, but under no circumstances and by no means, direct or indirect, must they bring

the pressure of numbers to bear on their employers or on each other.”¹

§ 396. **Repealing act of 1824.**²—This act is based upon the sounder economic view that labor and wages of labor are subject to the laws of supply and demand, and that interference with those laws is attended with disaster.

The act of 1824 begins with a long repealing section, which in its enumeration of legislation hampering labor is of great historical interest. It repeals all the acts so far noticed, so

¹Stephen's Hist. Crim. Law, vol. III, p. 208.

²5 Geo. 4, ch. 95.

“Apart from merely legal considerations, it ought, in approaching the studies of the later statutes and cases on the subject, to be borne in mind that trade unions were condemned, at all events by the rich and by employers of labor, on grounds altogether independent of any legal theory whatever. This condemnation proceeded upon two totally distinct grounds. The political economists, in many instances at least, wrote as if an attempt to alter the rate of wages by combinations of workmen was like an attempt to alter the weight of the air by tampering with barometers. It was said that the price of labor depended, like the price of other commodities, solely upon supply and demand, and that it could not be altered artificially.

“On the other hand, it was said that whatever might be the ostensible, or even as far as they went the real, objects of trade unions, their members habitually obtained these objects by unlawful means,—by intimidating workmen who proposed to work at a lower price than the one sanctioned by them; by acts of annoyance of greater or less atrocity; by personal violence, amounting in some cases to murder; and by the destruction of machinery, buildings and other property by fire or gunpowder.

“Further it was said that many of

the proceedings of trade unions were secret and illegal in themselves; that the members often swore obedience to secret committees, and under the compulsion of such oaths committed crimes in order to carry out their purposes. (As instances in which such facts were judicially proved, I may refer to the trial of the Glasgow cotton-spinners at Edinburgh in 1838, and the proceedings before the commission which sat at Sheffield in June and July, 1867, under 30 Vic., ch. 8 [Trades Union Commission Act, 1867]. Under the Combination Laws the irritation and violence of the workmen was, I believe, greater than after the acts of 1824 and 1825. See ‘Resolutions of Select Committee of the House of Commons,’ May 21, 1824, Hansard, xl, p. 811.) This was no doubt true to a considerable extent—to what extent must always be a question; and it is not surprising that the terror and indignation excited by the means employed should have been transferred to the bodies connected with such proceedings. The undoubted fact that in their capacity of benefit societies, and societies for assisting workmen in obtaining employment, the trade unions had rendered valuable services to artisans, was perhaps not as fully present as it ought to have been to many of those who felt strongly on the subject.” Stephen's Hist. Crim. Law, vol. III, pp. 211, 212.

far as they relate to combinations of labor. It then enacts: "That journeymen, workmen, or other persons, who shall enter into any combination to obtain an advance, or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he is hired, or, not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof, shall not therefor be subject or liable to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law."

The next section gave the same liberty to employers to enter into combination for the purpose of lowering or fixing rates of wages, increasing hours of work, or regulating their methods of carrying on business.

§ 397. But the act made the following interferences offenses, each punishable by two months' hard labor:

"By violence to person or property, by threats or by intimidation, wilfully or maliciously to force another to depart from his hiring or work before the time for which he is hired, or to return his work before it is finished.

"Wilfully or maliciously to use or employ violence to the person or property, threats or intimidation towards another on account of his not complying with trade-union rules.

"By violence to the person or property, by threats or by intimidation, wilfully and maliciously to force any master or mistress manufacturer, his or their foreman or agent, to make any alteration in their mode of carrying on business.

"Combining for any of the purposes before mentioned."

§ 398. Act of 1825.¹—The act of 1824 was too far in advance of the public sentiment of the day; it remained in force only one year, when it was repealed and replaced by the act of 1825. It was considered to have encouraged all sorts of combinations among workingmen;² and it was claimed that under

¹ 6 Geo. 4, ch. 129.

² "Mr. Huskisson said that the second section read like an invitation to workmen to combine for all trade

purposes which were not expressly punishable by the act; and he said that they had accordingly combined for many purposes which he regarded

license of the act workingmen combined to dictate to their employers how they should conduct their business and as to the number of apprentices employed; as to the rate of wages and the men who should be employed, etc.; and it appears from debates in parliament that the trade unions had exercised violence against non-union workingmen. In short, the troubles of those days seem to have differed very little either in degree or kind from the troubles of the present day.

The act of 1825 made no attempt to re-enact the laws specifically repealed by the act of 1824. On the contrary, in repealing the act of the year before it expressly provided that the statutes repealed by the act should remain repealed, and to that end the act of 1825 re-enacts practically *verbatim* the repealing section of the act of 1824.

Unlike the act of 1824 it does not begin with sections authorizing combinations of employers and employees, but it forbids and makes penal a variety of offenses. The offenses made punishable by two months' imprisonment at hard labor are the following:

If any person shall by violence to person or property, or by threats or intimidation, or by molesting or in any way obstructing another, forcing or attempting to force, any journeyman, manufacturer, workingman, or other person hired or employed

as unjustifiable, *e. g.*, to dictate to masters as to how they should conduct their business; to determine whether or not they should take apprentices; to prevent workmen from working; to secure an equal rate of pay for all workmen whether good or bad. Instances were also referred to, in the course of the debate, of violence exercised by trade unions against persons working independently of their rules. The different speakers appear to have thought that the act of 1824 repealed the common law as well as the statutes expressly mentioned, in support of which it might have been argued that it repealed so much of 33 Edw. I, st. 1 (The Statute of Conspirators), 'as relates to combinations or conspiracies of workmen or other persons' for

trade purposes, which are enumerated at great length. As the statute of Edward 1 does not in any way refer to trade, this is intelligible only on the supposition that 5 Geo. 4, ch. 95, intended to repeal the common-law rule supposed to have applied that statute to such combinations. At the time when the statute of 1824 was passed, great uncertainty prevailed as to the extent of the common law upon this subject. Mr. Hume (Hansard, X, p. 146) said that Mr. Scarlett thought 'that if all the penal laws against combinations by workmen were struck out of the statute book, the common law of the land would still be amply sufficient to prevent the mischievous effects of such combinations.' Stephen, *Crim. Law of Eng.*, vol. III, p. 218.

in any manufacture, trade or business, to depart from his employment or to return work in hand before the same shall be finished;

If any person shall prevent or attempt to prevent any journeyman, manufacturer or other person not employed from securing employment or accepting work from any person or persons;

If any person shall use violence to the person or property of another, or threats or intimidation, or shall molest or obstruct another, for the purpose of compelling such person to join any trade union or observe any trade-union rule;

If any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or obstructing another, force or endeavor to force any manufacturer or person carrying on any trade to make any change in his mode of regulating, managing, conducting or carrying on his business, or to limit the number of his apprentices or the number or description of his journeymen, workmen or servants.

Inasmuch as the act contained no section similar to that of 1824, punishing separately combinations to commit the offenses created by the act, it has been suggested that it was no doubt considered that such conspiracy would be indictable at common law.¹

§ 399. The act seems to be directed against the exercise of violence, intimidation, undue persuasion and unwarrantable interference generally with the rights and affairs of others. It expressly provides that it shall not cover persons who meet together for the purpose of consulting upon and determining the rate of wages and prices. It permits all combinations the object of which is to raise wages or prices.

¹ "In the place of the general permission to combine contained in sections 2 and 3 of the act of 1824, the act of 1825 contains two sections which come in by way of carefully guarded provisos upon the offenses created by section 3.

"Section 4 provides that the act shall not extend to subject any persons to punishment who meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the

persons present at such meetings shall demand for their work, or the hours for which they shall work; or who enter into any agreement among themselves for the purpose of fixing the wages or prices which the parties entering into such agreement shall demand for their work, or the hours during which they will work.

"A corresponding section applies to similar meetings amongst masters for the converse objects." Stephen's Hist. Crim. Law, p. 216.

By these acts of 1824 and 1825 the attempt was for the first time made to place labor and capital upon a footing of equality as regards combinations for raising wages and prices. It was explicitly recognized that if labor could peaceably combine to advance wages, capital must be permitted to combine to advance prices; but such combinations must not use means that are unlawful or oppressive — in short, the combinations are lawful unless they amount to conspiracies.

§ 400. **Trades Union Act of 1871.**— Pursuant to the recommendations of the commission of 1867 parliament in 1871 enacted what is known as the Trades Union Act,¹ and also an act “to amend the criminal law relating to violence, threats and molestation.”²

This act provided that the purpose of a trade union shall not be deemed unlawful so as to render any member of such union liable to criminal prosecution for conspiracy or otherwise, simply because the union is in restraint of trade.

In amending the criminal law it provided the penalty of imprisonment with hard labor up to three months for every one who should attempt to coerce another for trade purposes by —

The use of personal violence;

Threats such as to justify a magistrate in binding the threatener to keep the peace;

By molesting or obstructing in any of the following ways, namely, (a) by persistently following any person about from place to place; (b) by hiding his tools, clothes or other property; (c) by watching or besetting his house or following him along any street or road with two or more other persons in a disorderly manner. But it was expressly provided that no one should be liable for doing or conspiring to do any act on the ground that such act was in restraint of trade, unless it was one of the acts specifically mentioned.³

It is plain that the object of this amendment to the criminal law was simply to permit non-union men who wished to work to continue their employment and to go to and from their work without molestation.

¹ 34 & 35 Vic., ch. 31.

² 34 & 35 Vic., ch. 32. In his usually accurate work, Justice Stephen erro-

neously cites this act as of 38 & 39 Vic. See p. 224, vol. III.

³ Stephen's Hist. Crim. Law, *supra*.

§ 401. The subsequent history of this act — which was repealed four years later¹ — is as follows:²

“ Under this state of law it was commonly supposed that the ordinary procedure in a strike was legalized, but this was held not to be the case. In 1872 certain gas-stokers struck, the result of which was that a great part of London was for a time involved at night in complete darkness. They were indicted for a conspiracy to coerce or molest their employers in carrying on their business, and it was held that this was on two grounds an indictable conspiracy, though no offense was committed under the act last mentioned. The first ground was that it was an indictable conspiracy to force the company to carry on their business contrary to their own will by an improper threat or molestation. It seems to have been considered that the great public inconvenience which such a strike would cause, and the nature of the employers’ known engagements, might cause a threat to strike suddenly to be an improper molestation. Also a threat of a simultaneous breach of contract was regarded or was pointed out to the jury as conduct which they had a right to regard as a conspiracy to prevent the employer from carrying on his business. Upon this second charge the defendants were convicted and sentenced to eight months’ imprisonment. This case substantially decided, as far as its authority went, that, although a strike could no longer be punished as a conspiracy in restraint of trade, it might, under circumstances, be of such a nature as to amount to a conspiracy at common law to molest, injure or impoverish an individual, or to prevent him from carrying on his business. This decision caused great dissatisfaction amongst those who were principally affected by it, and was perhaps the principal occasion of the repeal of the act of 1871, and the enactment in its place of ‘the Conspiracy and Protection of Property Act, 1875.’ ”³

§ 402. Conspiracy and Protection of Property Act, 1875. This act provided that “An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of trade dispute between employers

¹ 38 & 39 Vic., ch. 36, § 17.

³ 38 & 39 Vic., ch. 86.

² See Stephen’s Hist. Crim. Law, vol. III, p. 225.

and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." In this regard the act coincides entirely with the views hereinbefore expressed concerning the essential elements of a criminal conspiracy.

It was also provided that any person who uses violence or intimidates another with a view to compel the other to abstain from doing any act which he has a right to do or to compel him to do any act which he has the right to refrain from doing, by following him about, hiding his tools, besetting his house, or following him through the streets in a disorderly way, is subject to three months' imprisonment at hard labor. Whoever wilfully and maliciously breaks a contract to work for any person who is supplying gas or water, or wilfully and maliciously breaks any contract of hiring or service, when he knows or ought to know that such breach of contract is apt to endanger life, cause serious bodily injury, or expose valuable property to destruction or serious injury, is subject to the same sentence.¹

¹ "First, there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labor, and end in general provisions preventing and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the statute law is put upon an entirely new basis, and all the old statutes are repealed, but in such a way as to countenance the doctrine about conspiracies in restraint of trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law, and carry it so far as to say that any agreement between two people to compel any one to do anything he does not like is an indictable conspiracy independently of statute. In 1871 the old doctrine as to agreements in restraint of trades

being criminal conspiracies is repealed by statute. But the common law expands as the statute law is narrowed, and the doctrine of a conspiracy to coerce or injure is so interpreted as to diminish greatly the protection supposed to be afforded by the act of 1871. Thereupon the act of 1875 specifically protects all combinations in contemplation or furtherance of trade disputes, and, with respect to such questions at least, provides positively that no agreement shall be treated as an indictable conspiracy unless the act agreed upon would be criminal if done by a single person. This remarkable history sets in a clear light all the most characteristic features of English criminal law,—its continuity; the way in which the existing law connects itself with the past history of the country, and in particular with the history of its opinions and theories; the character of the common law and the nature of what is described as its elasticity;

§ 403. Progress of the law towards greater freedom for labor.—The foregoing brief review of English legislation shows that there has been a steady, though at times slow, progress in the direction of greater freedom for labor, until at the present time the right of labor to combine for all purposes is not denied except where these purposes involve acts which are unlawful or oppressive.¹

and finally, the extremely detailed gradual nature of the changes in the law which are effected by acts of parliament eagerly advocated and eagerly opposed. In a legal point of view, no part of the whole story is so remarkable as the part played by the judges in defining, and, indeed, in a sense creating, the offense of conspiracy. They defined it, I think, too widely; but that their definition was substantially right is proved by the fact that the act of 1875 has made provision for punishing practically all the acts which they declared to be offenses at common law." Stephen's Hist. Crim. Law, vol. III, p. 226.

¹ In *Stevedores' Ass'n v. Walsh*, 2 Daly (N. Y.), 1, Judge Daly refers to the laws of England regarding combinations of labor as follows:

"There were statutes in England, from the passage of the Laborers' Act in the reign of Edward III., down to the reign of George IV., regulating the rates of wages, and forbidding agreements or combinations to evade these statutes; laws made in the interest of employers, in the creation of which those who were most affected by them had no share. By the act of 5 Geo. IV., ch. 95, all these statutes were repealed, and as this important statute was prepared with great care, its provisions may be appropriately referred to, both as indicating the state of common law, and as furnishing a good exposition of what the law ought to be upon this subject. It prohibits all persons from attempting, by threats, in-

timidation or violence, to force any workman to quit his employment, or to prevent him from hiring himself to or accepting work from any person, or for the purpose of compelling him to join any club or association, or to contribute to any common fund, or to pay any fine or penalty for not doing so, or for refusing to comply with any regulations made to obtain an advance, or to reduce the rate of wages, or to lessen the hours of labor or the quantity of work; but the act, at the same time, declares that it shall be lawful for any persons to meet together for the sole purpose of consulting upon or determining the rate of wages which the persons so assembling shall require or demand, or the hours or time they will work in their respective employments, and that they may enter into any agreements, verbal or written, among themselves, for the purpose of fixing the rate of wages which the parties so agreeing may demand, and that the persons so uniting and agreeing shall not be liable to any prosecution or penalty for so doing. The distinction which this statute makes between the legality of associations among workmen for the protection of their interests, by agreeing as a body not to work below certain prices, and an illegal combination formed for the purpose of making it compulsory upon all the journeymen in a particular branch of business, and upon the employers to conform to certain prices by imposing penalties upon the journeymen in a city or town

§ 404. **English cases and authorities.**— There seems to have been no rule of the common law against combinations of workmen, except where such combinations were either of a criminal character or directly against some statutory provision.¹

§ 405. There are some dicta to the effect that such combinations would be unlawful,² and “some traces may be found in the

who refuse to do so, or by agreeing as a body not to work for any employer who will employ such a journeyman, or one who will not pay the penalty or become a member of the combination, or which seeks to accomplish such a purpose by violence, intimidation, or other unlawful means, is one that has been slowly arrived at in England, and towards which the courts in this country have been gradually approximating, for the reason that it has its foundation in the plainest principles of justice. The apprehension that if this be conceded it would place employers wholly at the mercy of their workmen, who would have it in their power to exact any sum for their services, however extravagant, is altogether an imaginary one. It is not possible, by any organization among journeymen, to bring about such a result. The history of English legislation upon the subject of wages, and of the operations of trades unions, show that it is neither in the power of prohibitory laws nor of artificial combinations to control arbitrarily the price of labor, and that no combination can devise any general regulation or scheme that will bring to the same level the skillful and the incompetent, the diligent and the idle. All such matters regulate themselves.”

¹—The text-books down to at least 1800, appear to be silent as to the existence of any doctrine of the criminality at common law of combinations of masters or workmen. Neither in the earlier editions of Hawkins nor in East does the doctrine in ques-

tion appear to be stated. So in the edition of Burn's Justice of 1810, it is not mentioned under the title ‘Conspiracy;’ and under the title ‘Servants’ there are several statements of the statutes against combination, but there is no reference to common law. The various acts against combinations for controlling masters or workmen which were passed in the eighteenth century (1725, 13 Geo. 1, ch. 34, extended by 1729, 22 Geo. 2, ch. 27, § 12; 1799, 39 Geo. 3, ch. 81; 1800, 39 & 40 Geo. 3, ch. 106, etc.) commence by declaring or enacting agreements for such purposes theretofore made to be ‘illegal, null and void,’ which would not have been necessary if they had been thought to be criminal at common law; and they then proceed by independent enactments to make it punishable for the future to engage in them.

“The result of the whole appears to be that there is not sufficient authority for concluding that before the close of the eighteenth century there was supposed to be any rule of common law that combinations for controlling masters or workmen were criminal, except where the combination was for some purpose punishable under a statute expressly directed against such combinations, or was for conduct punishable independently of combination.” Wright, *Crim. Consp.*, p. 43.

²—The most important of these is the dictum of Grosse, J., in *R. v. Mawbey*, 6 T. R.: ‘In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though

ancient books of a doctrine that it is criminal for one man, independently of a combination, to oblige another, by bond or otherwise, to abstain from the exercise of his proper craft or employment." But even such bond has no direct relation to a combination; its legality or illegality rests upon considerations entirely foreign to those which control the validity of a combination.¹

It is stated by an eminent authority² that no case was ever cited prior to the year 1825 in which any person was convicted for a conspiracy in restraint of trade at common law for having combined with others for the raising of wages.

§ 406. Regarding a conspiracy to raise the wages of weavers in 1819, Baron Wood said: "The defendant has shown art in advising not to touch the hem of the garments of the law. That will not protect him, if he illegally and corruptly conspired. True, a laborer may refuse to work, be idle, or go to another master; but he may not advise, excite, or encourage others to do the same. He did not know whether conspiracy was not more dangerous than open violence."³

the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages, if he can; but if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy.' This dictum is an illustration not necessary to the decision of *R. v. Mawbey*, and founded, as it seems to me, upon the case of the 'Cambridge tailors.' "

¹ Justice Stephens, speaking of the common law, further says:

"I must add that I am quite unable to understand why, if all combinations to raise wages were at common law indictable conspiracies, it should have been considered necessary to pass the long series of acts already referred to. These acts are not in their form declaratory, nor do they even assume that contracts between workmen for the purpose of raising their wages are illegal in the

sense of being void and so incapable of being enforced by law. On the contrary they enact that they shall be void. Sir W. Erle observes that whilst the ancient statutes (p. 87) 'were in force they tended to prevent a resort to the common-law remedy for conspiracy.' The inference from the existence of the statutes appears to me to be that until they were passed the conduct which they punished was not criminal.

"On the other hand, the cases and dicta to which I have referred explain the undoubted fact that in the year 1825 an impression prevailed that a combination to raise wages would constitute an indictable conspiracy at common law." Stephen's *Hist. of the Crim. Law*, vol. III, p. 210.

² See Stephen's *Hist. Crim. Law*, vol. III, p. 209.

³ *British Ann. Reg.*, vol. 61 (1819), p. 242. See also other cases of combination, *Id.*, vol. 57 (1817), p. 298; vol. 52 (1810), p. 293; vol. 4 (1761), p. 175.

§ 407. **Combination of coal miners, 1832.**¹—The accused were indicted for conspiracy to intimidate an agent of a colliery, to oppress and injure the owners and to prevent the employees from continuing to work. The evidence of conspiracy was contained in a letter signed “By order of the directors for the body of coal miners in said colliery,” to the effect that all the workmen “would strike in fourteen days unless certain men were discharged from the colliery.” The jury were instructed that a conspiracy to procure the discharge of any of the workmen would support the indictment, and that the statute was never intended to empower men to meet and combine for the purpose of dictating to their masters whom they should employ, and that this was clearly illegal. The defendants were convicted.²

§ 408. **Combination to strike — Picketing, 1847.**—Defendants³ were indicted for conspiracy. The evidence tended to show that they had attempted to dictate what workmen should be employed, and to say that no journeymen not members of certain trades unions should be given work. Failing in their purpose, they struck, and circulated hand-bills announcing that “pickets” had been established around the foundry. Baron Rolfe charged the jury that under the statute⁴ providing that workingmen might meet and agree not to work for less than certain wages, etc., “if any illegal means be taken, the principle of the common law steps in and says that if persons conspire and combine together to effect this illegal object, an object that is of itself illegal, any such conspiracy to effect an illegal object is itself criminal; and what the prosecutors of this indictment have done is this: they have not proceeded under the statute to indict the parties for the alleged illegal act, but

¹ King v. Bykerdike, 1 M. & Rob. 179.

² In 1842, Tindal, C. J., charged a grand jury as follows (R. v. Harris, 1 C. & M. 661): “You will have numerous cases laid before you in which large bodies of dissatisfied workmen have interfered by personal violence and by threats of intimidation to compel others, who were perfectly willing to continue to labor in their calling at the rate of wages then

paid, to desist from their work. . . .

It is unnecessary to say that a course of proceeding so utterly unreasonable in itself, so injurious to society, so detrimental to the interests of trade and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law.”

³ Reg. v. Selsby (1847), 5 Cox, Cr. Cas. 495.

⁴ 6 Geo. 4, ch. 129.

they undertake to show a general combination amongst them all to effect these illegal acts, and for that it is they have indicted them." And the jury were further charged that "actual threats are not necessary, if the language used is such as tends to convey the impression of intimidation." But that "mere persuasion effected in a peaceable way is not illegal." Some of the defendants were found guilty of the conspiracy charged.¹

§ 409. Combination to compel discharge of an employee, 1851.—This case² involved a threat made by a committee that unless a certain employee was discharged every man in the factory would be called out. In this case it was definitely held that workmen have a right, while they are perfectly free from engagement, and have the option of entering into employment or not, to agree among themselves that they will not go into any employment unless they can get a certain rate of wages, and each man for himself may say: "I will not go into any employ unless I can get a certain rate of wages;" and all of them may say: "We will agree with one another that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages." But workmen have no right to combine together to persuade men already hired by and in the employ of other masters to leave that employment for the purpose of compelling those masters to raise their wages. Therefore, a conspiracy to obstruct a manufacturer in carrying on his business, by inducing and persuading workmen who had been hired by him to leave his service, in order to force him to raise his rate of wages, or to make an alteration in the mode of conducting and carrying on his trade, is an indictable offense; and an agreement to induce and persuade workmen under contracts of servitude for a time certain to absent themselves from such service is an indictable offense, although no threats or intimidation be proved or any ulterior object averred.

¹ In *Reg. v. Hewitt*, 5 Cox, Cr. Cas. 162, and *Reg. v. Duffield* (1851), *id.* 404, convictions were obtained under indictments charging conspiracy and combination contrary to the statute (6 Geo. 4), but apparently the offenses were here considered as combinations to do acts forbidden by statute,

and not as violations of any common-law principles. Campbell, C. J., in passing sentence in the former cases, alluded to the offense as a very serious one. See 21 Am. Law Rev. 51.

² *Reg. v. Duffield et al.*, 5 Cox, Cr. Cas. 404.

Workmen who agree that none of those who make the agreement will go into employ unless for a certain rate of wages have no right to agree to molest or intimidate or annoy other workmen in the same line of business who refuse to enter into the agreement, and who choose to work for employers at a lower rate of wages; and, *semble*, such agreement to molest or intimidate is an indictable conspiracy, as well in relation to workmen willing to be hired and employed as to those already hired and employed.¹

§ 410. Combination of cotton spinners, 1856.—Eighteen cotton spinners signed a bond binding themselves severally to carry on their business according to the resolutions of the majority, the bond reciting that the object was to counteract certain combinations of workmen whereby “persons otherwise

¹ Erle, J. (Reg. v. Rowlands, 5 Cox, Cr. Cas. 436), in summing up, had directed the jury as follows:

“The law is clear that workmen have a right to combine for their own protection and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons, not workmen, combining with them to assist in that purpose. As far as I know, there is no objection, in point of law, to it, and it is not necessary to go into that matter; but I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine — a benefit which by law they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another.

“The rights of workmen are conceded; but the exercise of free will

and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage.” This was urged as error on motion for new trial. (17 Q. B. 671.) Conviction of the lower court was sustained in the Queen’s Bench, it being considered, according to C. J. Campbell, as “an indictment at common law for conspiracy to violate an act of parliament.” Patterson, J., in passing sentence, said that the offense consisted in conspiracy to do an act by unlawful means, and that the act provided three months’ imprisonment, but this being an indictment at common law upon the statute the offense was punishable with fine and imprisonment, at the discretion of the court. *Rex v. Turner*, 13 East, and *R. v. Pyewell*, 1 Stark., are referred to as not being considered law.

willing to be employed are deterred, by a reasonable fear of social persecution and other injuries, from hiring themselves," etc. The question was whether this bond could be enforced. Of three judges of the Queen's Bench before whom the case was argued, one thought that the bond was void because the act of entering into it was an indictable misdemeanor, as being a conspiracy in restraint of trade. Another thought that the bond was good.¹ Lord Campbell, C. J., thought that the deed did not constitute an indictable conspiracy, but that it was void because it was opposed to public policy. The court of Exchequer Chamber² thought that the deed was void because it was in restraint of trade, but expressed no opinion as to the question whether or not it was an indictable conspiracy.³

§ 411. Combination of employees to coerce employers by oppressive means, 1859.⁴ — In 1859 there had been a strike of workmen employed in the building trade, and the employer in question resolved not to employ, and did not employ for

¹ Being rendered lawful by the exception contained in 6 Geo. 4, ch. 129, § 5.

² Consisting of six judges — Williams, Crowder, Willes, JJ., and Parke, Alderson and Platt, BB.

³ *Hilton v. Eckersley*, 6 E. & B. 47.

"The views of Crompton, J., and Lord Campbell, C. J., on the subject of conspiracy in restraint of trade, are thus expressed. Crompton, J., said (6 E. & B. 53): 'I think that combinations like those disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture.' His chief authority for this proposition was the dictum of Grose, J., in *R. v. Mawbey*, referred to above. Lord Campbell, on the other hand, after referring to this dictum, and stating that 'other loose expressions may be found in the books to the same effect' (6 E. & B. 62. The phrase 'loose expressions' seems to me to undervalue the authorities already referred to, especially the case of the *Cambridge Tailors*), says: 'I cannot

bring myself to believe, without authority much more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they (he means would have been at common law before the statute 6 Geo. 4, ch. 129, § 4, excused them from punishment) would be guilty of a misdemeanor and liable to be punished by fine and imprisonment.' The result is that the three judges of the court of Queen's Bench each took a different view of the law on this subject, and that the six judges of the court of Exchequer Chamber took a fourth view which excused them from pronouncing an opinion on the question whether such conduct as Lord Campbell described was at common law an indictable conspiracy or not." Stephen's *Hist. Crim. Law*, vol. III, pp. 219, 220.

⁴ *Walsby v. Anley*, 8 E. & E. (Q. B.) 515; 107 Eng. C. L. R. 515.

some time, any workmen who declined to work under the following declaration: "I declare that I am not now, nor will I during my engagement with you become, a member of, or support, any society which directly or indirectly interferes with the arrangements of this or any other establishment, or the hours or terms of labor; and that I recognize the right of employers and employed individually to make any trade engagements on which they may choose to agree."

On a certain day the employer had working two or more men under that declaration when the accused brought to him a certain document setting forth that at a meeting of joiners in his employ it was resolved that unless he discharged the men working under the declaration the parties to the combination would cease work immediately. The employer refused to submit to dictation, whereupon the members of the combination struck and were subsequently indicted and convicted for unlawfully by threats endeavoring to coerce their employer. Lord Cockburn said: "I am of opinion that this conviction must be affirmed. I am decidedly of opinion that every workman who is in the service of an employer, and is not bound by agreement to the contrary, is entitled to the free and unfettered exercise of his own discretion as to whether he will or will not continue in that service in conjunction with any other person or persons who may be obnoxious to him. More than this, any number of workmen who agree in considering some of their fellow-workmen obnoxious have each a perfect right to put to their employer the alternative of either retaining their services by discharging the obnoxious persons, or losing those services by retaining those persons in his employment. But if they go further, and, not content with simply putting the alternative to the employer, combine to coerce him, by threats of jointly doing something which is likely to operate to his injury, into discharging the obnoxious persons, I think that they may properly be said to bring themselves within the scope of the third section of the statute. In the case before us it was not one man merely who went to the employer and said that he should leave if the obnoxious workmen did not; nor several men merely, who, adopting the same course, gave their master the option of retaining them or the obnoxious men in his service; but several men, who combined together with the object of coercing the master into dismissing the ob-

noxious workmen by the threat of otherwise leaving in a body at a moment's notice. Although I at first entertained some slight doubt whether what was said amounted to a 'threat,' I have no doubt whatever that the conduct of the appellant and the other malcontent workmen amounted to a 'molesting' of the master, within the meaning of the act; and that their proceedings were altogether illegal, whether it is said that they threatened and intimidated or that they molested and obstructed the respondent, their employer, in his business."¹

¹ Crompton, J.: "I am of the same opinion. I doubted very much, on first reading the case, whether the conviction was right, because the threats and intimidation used by the workmen did not point to the commission by them of an act in itself unlawful, the threat being that they would do that which, taken by itself, they had a perfect right to do, namely, leave the employment. Although, however, I think that any workman has a right to go to his master and say, 'it is my whim not to work in company with so and so,' I think that several workmen have no right to combine to procure the discharge of persons obnoxious to them by threatening to leave the employment at once in a body unless those persons are forthwith discharged. It is matter of common learning that what a man may do singly he may not combine with others to do to the prejudice of another. Stat. 6 Geo. 4, ch. 129, by repealing all the previous statutes on the subject, appears to me to have re-established the common law as affecting combinations of masters or workmen. I adhere to the opinion that, at common law, all such combinations are illegal, and that Grose, J., rightly states the law in the passage to which I referred in the course of the argument. (In *Rex v. Mawbey*, 6 T. R., at p. 636.) That being so, it was necessary by sections 4 and 5 of the statute to render legal the combinations of workmen and masters

therein referred to, respectively, and which would, at common law, have been illegal. The combination charged in the present case is one by workmen to threaten to leave the respondent's service if he did not dismiss certain other workmen. That is a combination not within the protection of section 4, and falling within the prohibition in section 3 against endeavoring by threats or intimidation to force an employer to limit the number or description of his workmen. As in the indictment in *Regina v. Rowlands*, 5 Cox, C. C. 436, and the conviction in *Re Perham*, 5 H. & N. 30, so in the conviction now before us, the threats used by the appellant are not set out; those cases, however, show that that is immaterial; the nature of the language used, and whether or not it amounted to a threat, being matter of evidence and solely for the consideration of the magistrate. In the present case the magistrate decided (and I think rightly) that the appellant's language did amount to a threat, and that he had committed an offense under section 3 of the act."

Hill, J.: "I am of the same opinion. I have very little to add to what has fallen from the rest of the court, in which I entirely concur. 'Threat' in the statute must mean a threat to do an illegal act. The question, therefore, is, Was the act threatened by the appellant illegal? I entirely agree with what the lord chief justice has said as to the right

§ 412. Combination of boiler-makers and ship-builders, 1867.¹— One of the objects of this association was the relief of sick, disabled and aged members, and the burial of dead members, but another principal object was a trade union, and the support of members when on a strike. This latter object was held an illegal purpose, as being in restraint of trade.²

Lord Cochran said: “Here we find the very purposes of the existence of the society not merely those of a friendly society, but to carry out the objects of a trades union. Under that term may be included every combination by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority. I am very far from saying that the members of a trades union constituted for such purposes would bring themselves within the criminal law; but the rules of such a society would certainly operate in restraint of trade, and would therefore, in that sense, be unlawful.”³

of an individual workman, or any number of workmen, to tell their employer that they decline to continue to work with particular men to whom they object. If, however, they act in combination, not honestly or independently, but by way of a conspiracy, in order to coerce their employer to dismiss the men obnoxious to them, that combination is illegal. There was abundant evidence before the magistrate that the appellant had threatened the respondent with the carrying out of a combination amounting to an illegal conspiracy at common law. The appeal must therefore be discharged.”

¹ *Hornby v. Close*, L. R. 2 Q. B. 153.

² It was contended for the respondent that the society was not a society within § 44 of the 18 & 19 Vic., ch. 63; and further, that it was a society established for purposes which are illegal, being against public policy, in restraint of trade, and depriving the workman of the free exercise of his own will in the employment of his labor, and also in restraining him from getting employment or

continuing in employment for a non-member of the society; and lastly, that the society was an organization for, or tending to, the encouraging and maintaining of strikes.

³ And Blackburn, J., said: “Now, as the lord chief justice has said, the purposes of a trades union are clearly not analogous to those of a friendly society. A little deviation from the strict purpose of a friendly society might not take the society out of the scope of the act; but here a main object certainly—if not the main object, I think the main object—was that of a trades union, and therefore the magistrates were fully justified in declining to act. Secondly, I go further, and think the rules illegal in the sense of void, according to the principle of *Hilton v. Eckersley* (6 E. & B. 47, 66; 24 L. J. Q. B. 353; 25 L. J. Q. B. 199)—a case of combination by masters, but the same principle must apply to combinations of men,—that they are not enforceable at law. The court of exchequer chamber in that case carefully avoid going further, and saying

§ 413. Combination of shoemakers, 1869.—This was an indictment¹ for conspiracy to compel employees to quit their employment; and it appeared that the accused merely waited outside the place where the men were employed and tried to induce them not to work—that their conduct was civil and entirely peaceable. It was urged that under the statute the accused had the right to use persuasion, provided they did not endeavor to overcome the free action and free will of the employees by force or intimidation; that if they used simply persuasion they were not guilty of any criminal offense, no matter what the consequences of their acts might be.²

whether or not the objects of the masters were illegal in the sense of being criminal; and, acting on the authority of that case in the exchequer chamber, and adopting the view of Crompton, J., in the court below, I wish to guard myself from being supposed to express any opinion on the present case. I do not say the objects of this society are criminal. I do not say they are not. But I am clearly of opinion that the rules referred to are illegal, in the sense that they cannot be enforced; and on this ground, also, I think the society not within § 44, as not being 'for a purpose not illegal.' Whatever the inclination of my opinion, it is unnecessary to decide whether the illegality of any of the rules would taint the whole, because here the illegal objects formed not a small part, but a principal, if not the whole, object of the society."

¹ Under 6 Geo. 4, ch. 129, § 3.

² Reg. v. Shepherd et al., 11 Cox's Crim. Cas. 325. Lush, J., said if the defendants had known the addresses of the men they might have gone round to them to persuade them from working, and this would have been perfectly legal. The question in the case was, Whether they had done wrong by waiting for them in the street? To bring them within the terms of the act of 22 Vict., there must have been threats or molesta-

tions otherwise than by endeavoring peaceably and in a reasonable manner to persuade others to cease or abstain from work. In a similar case tried before him at Leeds, he remembered telling the jury that the defendants had a perfect right to persuade, and that in order to do so they must have access to the persons whom they wished to persuade. If they did that in a peaceable manner their conduct would be lawful. In the case cited the parties charged were guilty of conduct such as any reasonable person would call intimidation. They abused their fellow-workmen, shouted and hooted at them, and were otherwise violent in their conduct. He agreed entirely with what Baron Bramwell had said; but the question was whether it applied to the present case. It was very important that the law should be settled in regard to these matters. The better way would be to take the opinion of the jury on the case and reserve the question for the court of criminal appeal. In summing up the learned judge said the defendants were charged with conspiring together to do an unlawful act. The act stated that if violence was used, either to persons or property, or threats, intimidation, molestation or obstruction, then the persons offending brought themselves within the terms of the law. In this case the

§ 414. Combination of employees of gas companies, 1872. Certain servants of a gas company under contract of service, being offended by the dismissal of a fellow-servant, agreed together to quit the service of their employers, without notice and in breach of their contracts of service, by reason of which the company were seriously impeded in the conduct of their business. Being indicted for a conspiracy it was contended that the statute¹ having determined that no act shall be illegal merely by reason of its being in restraint of trade, and having also defined the offense of "obstructing or molesting," and otherwise determined what shall be deemed to be offenses as between masters and servants, had virtually declared all other acts not to be punishable. But the court decided that the provisions of the statute had not affected the common law of conspiracy, for which an indictment would lie.²

question which they would have to decide was, whether the defendants did endeavor to control the free agency or overcome the free will of their fellow-workmen by force or intimidation; and if so they would be guilty of the offense imputed to them; but if there had been merely persuasion, no matter what the consequences were, then it would not be at all an unlawful act.

In *Reg. v. Druitt* (1867), 10 Cox's Crim. Cas. 592, upon an indictment charging conspiracy "to impoverish" Henry Poole and others in their trade and business, and to restrain their freedom of trade and personal action, after alluding to the fact "that no right in England under our laws is so sacred as the right of personal liberty," he goes on to say: "If any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offense, namely, that of conspiracy against the liberty of mind and freedom of the will of those towards whom they thus conduct themselves." He was referring to coercion and compulsion, something that

was unpleasant and annoying to the mind operated upon, and he laid it down as clear and undoubted law, that if two or more persons agreed that they would by such means cooperate together against that liberty they would be guilty of an indictable offense. The public had an interest in the way a man disposed of his industry and his capital, and if two or more persons conspired by threats, intimidation or molestation to deter or influence him in the way in which he should employ his industry, his talents or his capital, they would be guilty of a criminal offense. That was the common law of the land, and it had been, in his opinion, reenacted by an act of parliament passed in the sixth year of the reign of George IV., which provided, etc.: "The defendants were indicted for doing what was in opposition to the law and the statute he had described." Under this charge the defendants were convicted. From 21 Am. Law Rev. 55.

¹ 34 & 35 Vic., ch. 81.

² *Reg. v. Bunn et al.* (1872), 12 Cox's Crim. Cas. 316.

CHAPTER 12.

COMBINATIONS OF LABOR IN THE UNITED STATES.

§ 415. Statutes concerning combinations of labor.

416. Early American cases.

417-419. Combination of boot and shoemakers, 1806.

420-423. Combination of cordwainers, 1809.

424, 425. Combination of shoemakers — *Com. v. Carlisle*, a leading American case, 1821.

426-428. Combination of journeymen hatters, 1823.

429. Combination of journeymen tailors, 1827.

430-432. Combination of journeymen shoemakers, New York, 1835.

433-435. Combination of journeymen shoemakers, Massachusetts, 1842.

436-439. Combination of curriers, 1867.

440, 441. Combination of journeymen freestone cutters, 1870.

442, 443. Combination to resist encroachments of employers, 1873.

444. Combination of stevedores, 1876.

§ 415. Statutes concerning combinations of labor.— In a subsequent chapter a summary of the various statutory provisions affecting combinations of labor will be given. Many of these statutes are so obviously the result of political rather than economic or legal considerations that it would be idle to attempt to trace in them any logical development of the law. The same legislature that loses itself in the endeavor to find words sufficiently sweeping and drastic to condemn all combinations of capital, runs counter to the plainest constitutional limitations and the dictates of common sense in an effort to specifically authorize and approve all combinations of labor. Inasmuch as it is impossible to reconcile these extraordinary statutory enactments with any theory of the law and with the decisions which are not based upon such enactments, such attempt will not be made; the statutes will be considered separately, as — it might almost be said — the curiosities and eccentricities rather than the legitimate development of the law.

§ 416. Early American cases.— It is possible, however, to trace the development of the law and public opinion in the early American decisions, especially in those decisions which

do not turn specifically upon some statute. It is said¹ that the earliest reported case is that of the Boot and Shoemakers, Philadelphia (1806), reported in a pamphlet now extremely scarce; the case was tried in the mayor's court, which was presided over by Recorder Levy, said to have been a lawyer of distinction.

§ 417. **Combination of boot and shoemakers, 1806.**— The accused were journeymen boot and shoemakers; and, not being satisfied with the usual rates of wages, entered into a combination the object of which was to increase their wages; and as a means to that end they adopted a scale of work and wages, and agreed among themselves to refuse to work except according to the scale. It was also charged that they agreed to prevent by threats, menaces and unlawful means other workmen from working except at the established rates. In short, the evidence showed the existence of a union, the object of which was to advance wages by means of concerted action for the benefit of the members of the union, and, if necessary, the resources of the union were to be employed against all workmen who were not members of the union.

In charging the jury the recorder stated the law broadly to be:

1. That it was immaterial whether employers or employees be the prosecutors; that the law was the same regarding combinations of either.

2. That it was immaterial what the motives of the accused were, whether to resist alleged oppression of employers or to insist upon extravagant compensation for themselves; the sole question being whether they were guilty of the offense actually charged against them.

3. That the prices for goods are ordinarily regulated by the character of the demand and the character of the supply; that a combination the object of which is to regulate prices regardless of the demand, regardless of the quality of the goods, is an unnatural way of raising prices of either goods or work, and the law does not protect such conduct.

4. Such arbitrary regulation of wages tends to place inferior workmen upon a level with good, since it compels the master

¹ See Carson's Ed. Wright, Crim. Consp. 145.

to pay the same wages to each. All incentive to excel in workmanship or industry is thereby taken away.

5. Such combination is pregnant with public mischief and private injury, and tends to demoralize workmen and destroy the trade of a city.

6. Inasmuch as the association seeks to attain its objects by virtually compelling workmen to become members, or, in the event of their refusing, depriving them of their opportunity to work, it is illegal.

7. The objects of the combination being to benefit the members by raising their wages and to injure those who did not join in the combination, the law condemns both as criminal.

It is legal for men individually to refuse to work except at certain wages, and many, if acting as individuals, may come to the same determination; but where they combine together and reach that determination by an agreement, and pledge themselves to abide by the agreement, the combination is illegal.

§ 418. A report of the case is so difficult to obtain that the following summary by Mr. Carson is given somewhat at length (page 145):

“The indictment contained three counts. The first charged that the defendants, being workmen and journeymen cordwainers, and not being content to work at the usual rates, conspired to increase the rates usually paid to them and to other workmen in the same art by refusing to work at current rates, and by demanding for their future labor an advanced rate according to a specified scale of work and wages. The second count charged that they had agreed to prevent other workmen in the same art, by threats, menaces and other unlawful means, from working, except at certain rates which they then and there fixed and insisted should be paid. The third count charged that they had conspired to form and did form a club and combination, and made unlawful and arbitrary rules, by-laws and orders for the government of themselves and others, and agreed not to work for any master who should employ any workman or journeyman cordwainer or other person who should thereafter infringe or break any of their rules, and that they would, by threats, menaces and other injuries, prevent any other workman or journeyman from working for such master. The indictment then set forth overt acts, and concluded to the dam-

age of the masters, of the citizens of the commonwealth generally, and to the great damage and prejudice of other artificers and journeymen in the art of a cordwainer, to the evil example of others, and against the peace and dignity of the commonwealth.

“The attorney-general asserted that the prosecution had been commenced, not from any private pique or personal resentment, but solely with a view to promote the common good of the community, and to prevent in future the pernicious combinations of misguided men to effect purposes not only injurious to themselves, but to society.”

§ 419. The facts are sufficiently recited in the charge of the recorder, the material parts of which were as follows:

“It is of no importance whether the journeymen or the masters be the prosecutors. What would it be to you if the thing was turned round, and the masters were the defendants instead of the journeymen? No matter what their motives were, whether to resist the supposed oppression of their masters or to insist upon extravagant compensation; no matter whether this prosecution originated from motives of public good or private interest, the question is whether the defendants are guilty of the offenses charged against them?

“It is proper to consider, is such a combination consistent with the principle of our law and injurious to the public welfare? The usual means by which the prices of work are regulated are the demand for the article and the excellence of its fabric. Where the work is well done, and the demand is considerable, the prices will necessarily be high. Where the work is ill done, and the demand is inconsiderable, they will unquestionably be low. If there are many to consume and few to work, the price of the article will be high; but if there few to consume and many to work, the article must be low. These are the means by which prices are regulated in the natural course of things. To make an artificial regulation is not to regard the excellence of the work or the quality of the material, but to fix a positive and arbitrary price, governed by no standard, controlled by no impartial person, but dependent on the will of the few who are interested; this is the unnatural way of raising the price of goods or work. Is the rule of law bottomed upon such principles as to permit or protect such

conduct? Consider it on the footing of the general commerce of the city. Is there any man who can calculate (if this is tolerated) at what price he may safely contract to deliver articles for which he may receive orders, if he is to be regulated by the journeymen in an arbitrary jump from one price to another? It renders it impossible for a man, making a contract for a large quantity of such goods, to know whether he shall lose or gain by it. Can he fix the price of his commodity for a future day? It is impossible that any man can carry on commerce in this way. He may be ruined by the difference of prices made by the journeymen in the intermediate time. What, then, is the operation of this kind of conduct upon the commerce of the city? It exposes it to inconvenience, if not ruin; therefore it is against the public welfare. How does it operate upon the defendants? We see that those who are in indigent circumstances and who have families to maintain, and who get their bread by their daily labor, have declared here upon oath that it was impossible for them to hold out; the masters might do it, but they could not; and it has been admitted by the witnesses for the defendants that such persons, however sharp and pressing their necessities, were obliged to stand to the turn out or never afterwards to be employed.

“Can such a regulation be just and proper? Does it not tend to involve necessitous men in the commission of crimes? Consider these circumstances as they affect trade generally. Does this measure tend to make good workmen? No; it puts the botch, incapable of doing justice to his work, on a level with the best tradesman. The master must give the same wages to each. Such a practice would take away all the incentive to excel in workmanship or industry. In every point of view this measure is pregnant with public mischief and private injury; it tends to demoralize the workmen and to destroy the trade of the city. What has been the conduct of the defendants in this instance? They belong to an association the object of which is that every person who follows the trade of a journeyman shoemaker must be a member of their body. The apprentice immediately on becoming free, and the journeyman who comes here from distant places, are all considered members of this institution. If they do not join the body, a term of reproach is fixed upon them. The members of the body will

not work with them, and they refuse to board or lodge with them. The consequence is that every one is compelled to join the society. It is in evidence that the defendants in this action all took part in the last attempt to raise their wages. . . . Keimer was their secretary, and the others were employed in giving notice, and were of the tramping committee. If the purpose of the association is well understood, it will be found they leave no individual at liberty to join the society or reject it. They compel him to become a member. Is there any reason to suppose that the laws are not competent to redress an evil of this magnitude?

“What is the case now before us? A combination of workmen to raise their wages may be considered in a twofold point of view: one is to benefit themselves, the other is to injure those who do not join their society. The rule of law condemns both. Hawkins, the greatest authority on the criminal law, has laid it down that a combination to maintain another in carrying out a particular object, whether true or false, is criminal. The authority cited from 8 Mod. Rep. does not rest merely upon the reputation of that book. It is adopted by Blackstone, and it is laid down as the law by Lord Mansfield in 1793, that an act innocent in an individual is rendered criminal by a confederacy to effect it.

“One man determines not to work under a certain price, and it may be individually the opinion of all. In such a case it would be lawful in each to refuse to do so; for if each stands alone, each may withdraw from his determination when he pleases. In the turn out of last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the price of wages and gone to work; but it has been given to you in evidence that they were bound down by their agreements, and pledged by mutual engagements, to persist in it, however contrary to their own judgment—the continuance in improper conduct may therefore well be attributed to the combination.”¹

§ 420. Combination of cordwainers, 1809.²—This case was tried in the mayor’s court.³ The accused were members of the

¹The defendants were convicted.

²People v. Melvin et al., Wheeler’s Crim. Cas., vol. 2, p. 262.

³This was argued during the mayoralty of the Hon. De Witt Clinton, and exceptions were taken to each

Society of Journeymen Cordwainers, the rules of which limited the number of apprentices that might be employed by the masters, and also providing that apprentices should not be employed who were not members of the society, and journeyman should not be employed who had infringed the rules of the society, otherwise a strike would result. It seems in these early days an offending member was termed a "scab," and wherever he was employed no members of the society were allowed to work.¹

§ 421. As part of their defense the accused offered to show:

1. That long before the strike or turn out there was a com-

count in the indictment. It was drawn by an eminent criminal lawyer, and each count was sustained by the court.

¹ "These facts appeared: There was a strike against the shop of Corwin & Aimes, but as it appeared to the society that they contrived to defeat its operation by privately getting their work done at other shops, the society in November, 1809, ordered a general strike against the masters. There were one hundred and eighty-six members, and about as many journeymen who were not members, but all the best workmen were of the society. Benjamin, who testified as to this general strike, said he never knew of but one general turn out. He testified that he had been fined and threatened for working against the rules of the society. He admitted, on his cross-examination, that he came voluntarily into the society, and also that, on the question for a general turn out, the members voted by secret ballot, and that no compulsion is used, but every man votes according to his inclination, the majority carries it, and then it becomes a law and the contraveners of it are 'scabbed.' Edward Whittess had worked for Corwin & Aimes about four or five years and had joined the society about six or seven years ago. He was fined at different times, and at the time of the general meeting

there was a rumpus in the society which, with the multiplicity of the fines, determined him to leave it and change his occupation, and take to cramping boot legs. He had, while a member, acted as sexton to a church, for which he had \$60 yearly. This prevented his attendance and occasioned him sometimes to be fined. During the time he was first scabbed his employer was obliged to discharge him until he paid his fine and was reinstated. He admitted that he came voluntarily into the society and remained in it for six or seven years.

"Mr. Aimes proved that he had received several notices, one to discharge Whittess, which he complied with; another to discharge a boy, an apprentice of Britton, who had worked with him two or three years. Witness thought it a great hardship that the old man should lose the profit of the work of the apprentice he had instructed and did not discharge him, for which the body struck against him. On cross-examination he admitted he had contributed some money towards carrying on this prosecution.

"James Britton confirmed this testimony, and said that after he had instructed his apprentice, whose work was his chief support (he himself being in years), he was deprived of that help by the influence of the body of which he was not a member." *Idem*.

bination of the masters for the express purpose of lowering the wages of the workmen, which combination was oppressive to them; and that their society originated in the necessity of protecting themselves against such combinations; and further, that the masters were then in combination for the purpose of the prosecution.

This was objected to and overruled upon the ground that the misconduct of the masters would be no justification of the defendants. It was then offered as evidence in mitigation, but the court said that, if there were circumstances merely in mitigation of the sentence, they would come more properly in affidavit in case of conviction.

2. The defendants attempted to show that the wages and rates contended for, and demanded by, the journeymen were reasonable and no higher than to afford them a bare maintenance. This evidence was not received, because none had appeared on the part of the prosecution to show that unreasonable or extravagant demands had been made. It was therefore held irrelevant to rebut what had not been proved.

3. The defendants also proposed to prove that the masters made an excessive profit on the labor of the workmen; but this was refused also upon the former ground, that the misconduct of the masters would not justify a conspiracy or illegal combination in the journeymen.¹

¹One of the counsel for the accused, after reviewing the English cases, argued: "Admitting all the cases cited against the defendants from the English books to be of full authority, that none of them would warrant a conviction. It seemed to him that the moment it was admitted that the object of the conspiracy was not criminal there ought to be an end of the prosecution. And the doctrine and argument touching a conspiracy, to do a lawful act by unlawful means, seemed to him a distinction without a difference, an unnecessary refinement, and at best a begging of the question. To conspire to use unlawful means was to conspire to do an unlawful thing, and was an unlawful conspiracy. All that he admitted freely. But when that was admitted, the question, whether there had been such a conspiracy, was not a whit advanced, and he contended as confidently as before that there had not. He read and commented upon the constitution of the society, and maintained that all the words of coercion with which it abounded, all the terms of arbitrary command, which might furnish such fertile subjects for declamation, were innocent and harmless, and would be so considered by candid judgment, when the undeniable truth was taken into the account, that the only compulsion they used was a refusal to work with those whom they considered as joining in oppression against them.

§ 422. The mayor in his charge to the jury said that the offense of conspiracy might be considered from two points of view: "The one where there existed a combination to do an act unlawful in itself, or to the prejudice of other persons; the

There was a well received and settled definition of crimes, by which they were divided into two comprehensive classes: those called *mala in se*, which were crimes against the universal laws of God and nature, and those termed *mala prohibita*, or offenses against positive institutions. There must in this country be statutes enacted by the legislature, which speak the will and voice of the people. Beyond this definition there can be no crime, and it is impossible to draw the refusal of a body of men to labor under terms disadvantageous to themselves, or which they think disadvantageous to them, under either branch of this definition, without more subtlety than ought to be admitted in the law, and more straining than the genius of our code allows, to be used against defendants in any criminal case." Counsel for the prosecution replied with a good deal of rhetoric, not to say eloquence, in the following strain: "If England, in the times of general disorder throughout Europe, escaped almost singly from the devastations of civil war, revolution and invasion, it was owing to the love of the laws that animated the people to contend, heart and hand, for their precious birthright, and to the genius of their constitution that watched over their destiny. What else had protected the English people from guillotine, bastille and inquisition? What else had implanted in the United States the principles of freedom which had grown up and matured, and finished in their perfect independence? Why was their condition even as colonies so much above that of Brazil or Mexico, countries towards which nature

had been perhaps more lavish of her favors? It was the principles of the common law which our ancestors brought with them which first prompted them to assert their independence, and then in the days of trial and of strife moderated the fury of revolution, and served as sure and solid foundations of future security. It was in that free and hallowed volume which served as their palladium, and in which they found written the first lessons of their independence. It was the mild spirit of the common law that tempered the evils of civil convulsion and calmed the agitated waves, and finally shone forth with renovated lustre when those storms had passed away; that common law, the great magazine which supplied our state and national constitutions with abundant and useful materials for their solid structure. Mr. Griffin then argued upon the evidence, and admitted that there had been no personal violence, no outrage or disorder, but asked if the coercive measures of the society were less cruel or oppressive for that reason. He made strong remarks upon the imperious and tyrannical edicts of the constitution and by-laws of the society, and asked whether it was possible for any workman to enjoy, without molestation, the indisputable rights of peace, neutrality and self-government in his own private and particular concerns. A journeyman was neither free to refuse entering into the society, nor at liberty, having done so, to leave it without incurring ruin or unmerited disgrace; and to the real impoverishment which he must undergo, and

other where the act done or the object of it was not unlawful, but unlawful means were used to accomplish it. As to the first, there could be no doubt that a combination to do an unlawful act was a conspiracy. The second depended on the common principle that the goodness of the end would not justify improper means to obtain it. If, therefore, in the present case, the defendants had confederated either to do an unlawful act, to the injury of others, or to make use of unlawful means to obtain their ends, they would be liable to the charge of a conspiracy. He observed that the court did not mean to say, nor did the facts in the case require them to decide, whether an agreement not to work, except for certain wages, would amount to this offense, without any unlawful means taken to enforce it.”¹

to the evils heaped upon all who befriend him, to all this was added the opprobrious epithet of ‘scab.’ If an individual master refused obedience to their laws, or fell under the displeasure of the society, a stroke was directed against him. And, though the stroke was not a corporal wound, it was a cruel and ruinous infliction from which he could have no relief unless the law provides one. He was proscribed without remorse and outlawed without mercy. If the master workmen in general happened to offend this society, a general cessation of labor amongst the members of their own body was decreed, to which obedience was rigorously enforced; however much the necessities of their families might require their work, idleness was enjoined upon them. They were commanded to do no manner of work; but it was a Sabbath not of rest, but of vengeance, of desolation and of suffering. Mr. Griffin urged then a variety of other topics with great strength and effect, and concluded by what might be understood as a summary of his argument. He did not complain of the defendants for forming themselves into a society, but for compelling others to become members. He did

not accuse them of having advanced the price of their own labor, but of conspiring to regulate, by measures of rigor and coercion, the wages and the will of others; his charge against them was not that they chose and determined for what employers they would or would not work, but that they had exercised an aristocratic and tyrannical control over third persons, to whom they left neither free will nor choice; and that they employed, to effect this purpose, means of interference in their concerns to which it was impossible for the sufferers to oppose any resistance.” *Idem.*

¹ Referring to the application of the common law the mayor said: “Much has been said as to the application of the common law of England to the case. The absurdities of the ancient common law, and also of the statute law of England, had been exhibited in the strongest light. It was well known that many of the ancient rules of the common law on this and other subjects had been exploded or become obsolete, and that little of the mass of absurdities complained of by the defendants’ counsel remained in force even in England. In this state the court could not be

§ 423. Proceeding, the mayor charged that "the injury produced by unlawful combinations might affect any person or number of persons, as in the present case the master workmen, or the fellow journeymen of the defendants, or any other individuals. It appeared in evidence that the society of journeymen, of which the defendants were members, had established a constitution or certain rules for its government, to which the defendants had assented, and which they had endeavored to enforce. These rules were made to operate on all the members of the society, on others of their trade who were not members, and through them on the master workmen, and all were coerced to submit, or else the members of the society, which comprehended the best workmen in the city, were to stop the work of their employers. One of the regulations even required that every person of their trade whom they thought worthy of notice should become a member of the society, and of course become subject to its rules, and in cases of neglect or refusal it imposed fines on the person guilty of disobedience. When the society determined on any measure it found no difficulty in carrying it into execution. If its ordinary functions failed, it enforced obedience by decreeing what was called a strike against a particular shop that had transgressed, or a general turn out against all the shops in the city, terms which had been explained by the witnesses, and were sufficiently understood. These steps

at a loss in deciding how far the common law of England was applicable. Our immediate ancestors claimed it as their birthright. They considered it as securing to them many of their highest privileges, and they often appealed to that law in support of their rights and against the arbitrary extension of power by the British parliament. The constitution of this state had also expressly adopted it, and declared that such parts of the common law of England, and the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of said colony on the 19th of April, 1775, and not repugnant to the constitution, should be and

continue the law of this state, subject to such alterations and provisions as the legislature of this state shall from time to time make concerning the same, etc. No alteration having been made by our constitution or laws, the common law of England as it existed at the period last mentioned must be deemed to be applicable, and by that law the principles already stated appeared to be well established. No precedents, it was true, of convictions or judgments upon them had been produced from our own courts, but no strong inference could be drawn from that, as until lately such precedents had not been preserved, and no printed reports of adjudged cases had been published." *Idem.*

were generally decisive and compelled submission in all concerned. Whatever might be the motives of the defendants or their object, the means thus employed were arbitrary and unlawful, and their having been directed against several individuals in the present case, it was brought, in the opinion of the court, within one of the descriptions of the offense which has been given.”¹

§ 424. Combination of shoemakers — *Com. v. Carlisle*, a leading American case, 1821.—In this case,² which has been referred to so often, certain master shoemakers met and agreed with each other not to employ any journeyman who would not consent to work at reduced wages; it appeared that the object of the agreement went no further than to establish certain rates of wages which had prevailed a few months before, and from which, there was reason to believe, the employers had been compelled to depart by a combination among the journeymen. The case as reported came up on a motion to discharge on the ground that a combination to regulate wages is no offense by the common law of Pennsylvania.

§ 425. In passing upon the motion Justice Gibson referred as follows to the law as it then existed, incidentally reviewing certain cases already cited in this chapter: “In no book of authority has the precise point before me been decided.³ In the trial of the boot and shoemakers of Philadelphia, there was no general principle distinctly asserted, but the case was

¹“The jury retired, and shortly after returned a verdict against defendants. Sentence was then passed by his honor the mayor, who observed to the defendants that the novelty of the case, and the general conduct of their body composed of members useful in the community, inclined the court to believe that they had erred from a mistake of the law, and from supposing that they had rights upon which to found their proceedings. That they had equal rights with all other members of the community was undoubted, and they had also the right to meet and regulate their concerns, and to ask for wages, and to work or refuse; but that the means they used were of a nature

too arbitrary and coercive, and which went to deprive their fellow-citizens of rights as precious as any they contended for. That the present object of the court was rather to abolish than to punish; but an adjudication upon the subject being now solemnly had, it was recommended to them so to alter and modify their rules and their conduct as not to incur in future the penalties of the law. They were fined each \$1 with the costs.” *Idem.*

² *Com. v. Carlisle*, Brightly’s R. 36.

³ “*Rex v. The Tailors of Cambridge* is found in a book (8 Mod. 10) which can claim nothing beyond the intrinsic evidence of reason and good sense apparent in the cases it contains.” *Idem.*

considered only in reference to its particular circumstances, and in these it materially differed from that now under consideration. And in the trial of the journeymen cordwainers of New York, the mayor expressly omits to decide whether an agreement not to work, except for certain wages, would be indictable *per se*. There are, indeed, a variety of British precedents of indictments against journeymen for combining to raise their wages; and precedents rank next to decisions as evidence of the law; but it has been thought sound policy in England to put this class of the community under restrictions so severe, by statutes that were never extended to this country, that we ought to pause before we adopt their law of conspiracy as respects artisans, which may be said to have, in some measure, indirectly received its form from the pressure of positive enactment, and which therefore may be entirely unfitted to the condition and habits of the same class here. An investigation of the principles of the law which declares the offense, then, becomes absolutely necessary to a correct decision in this particular instance."

Proceeding, the court said: "The unsettled state of the law of conspiracy has arisen, as was justly remarked in the argument, from a gradual extension of the limits of the offense; each case having been decided on its own peculiar circumstances, without reference to any pre-established principle. When a combination had for its direct object to do a criminal act, as to procure the conviction of an innocent man (the only case originally indictable, and which afterwards served as a nucleus for the formation of the entire law of the subject) the mind at once pronounced it criminal. So where the act was lawful, but the intention was to accomplish it by unlawful means; as where the conviction of a person known to the conspirators to be guilty was to be procured by any abuse of his right to a fair trial in the ordinary course. But when the crime became so far enlarged as to include cases where the act was not only lawful in the abstract, but also to be accomplished exclusively by the use of lawful means, it is obvious that distinctions as complicated and various as the relations and transactions of civil society became instantly involved, and to determine on the guilt or innocence of each of this class of the cases, an examination of the nature and principles of the offense be-

came necessary. This examination has not yet been very accurately made; for there is in the books an unusual want of precision in the terms used to describe the distinctive features of guilt or innocence. It is said the union of persons in one common design is the gist of the offense; but that holds only in regard to a supposed question of the necessity of actual consummation of the meditated act; for if combination were in every view the essence of the crime, it would necessarily impart criminality to the most laudable associations."¹

After referring to certain authorities, Justice Gibson continued: "It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the objects to be attained as a consequence of the lawful act, is, in this class of cases, the discriminative circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence. To give appropriate instances respectively referable to each branch of this classification of criminal intention — if a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined, not for the purpose of oppression, but fair competi-

¹ "It is said in Leach's note to Hawkins, b. i, ch. 72, 3, that the conspiracy is the gist of the charge, and that to do a thing lawful in itself by conspiracy is unlawful; but that is begging the very question whether a conspiracy exists, and leaves the question of what shall be said to be doing a lawful act by conspiracy as much in the dark as ever. Mr. Chitty, in his Criminal Law (vol. III, p. 1139), the best compilation on the subject extant, very truly says there are many cases in which an act would not be cognizable by law, if done by an individual, that would, neverthe-

less, be the object of an indictment if effected by several with a joint design; yet he, too, says the offense depends on the unlawful agreement, and not on the act which is to follow it; the act when done being but evidence of the agreement. From this it might be inferred that the act can operate only to show that an agreement of some sort has taken place, but not by its nature or object to stamp the character of guilt on it; but Chitty himself admits that it is impossible to conceive a combination, merely as such, to be illegal." *Idem*.

tion with others of the same calling. So with respect to the other branch; if the bakers of a town were to combine to hold up the article of bread, and by means of a scarcity thus produced extort an exorbitant price for it, although the injury to the public would be only collateral to the object of the association, it would be indictable; and to one or other of these may the motive in every decided case be traced. Thus a combination to marry under feigned names was criminal, because the object was to affect the interest of a particular parish under the poor laws, or to injure an individual by setting up a colorable title to his estate; an agreement between the officers of an army to throw up their commissions simultaneously, in a time of public danger, or between a number to hiss a play, right or wrong, was indictable, because there was an unmixed motive of mischief to the public or an individual. So, on the other hand, in a confederacy to raise the price of the funds, to sell bad liquors, or to procure the release of a prisoner by entering insufficient bail, the motive is not prejudice to the public or an individual, but undue gain to the confederates or their friends, which is unlawful only in reference to the means used to procure it. I take it, then, a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be, if there was no recurrence to artificial means by either side, is criminal. There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest on that of any other individual, beyond the limits of fair competition; but the increase of power by combination of means being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so

powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual. The combination of capital for the purposes of commerce, or to carry on any other branch of industry, although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs, which stimulates to competition and enables men to engage in undertakings too weighty for an individual. It would, I grant, be impossible for the employers in any branch of manufactures to produce a permanent depression of wages, because others would find it to their interest to embark in the business on more liberal terms; and these, by a just compensation for labor, would have a monopoly of all the journeymen; they would ultimately ruin those who should adhere to the system of depression. The competition of interest must eventually break up every combination of the kind. But though every plan of coercion must recoil on those who put it in practice, it may occasion much temporary mischief to others. The journeymen are compelled to enter, with their employers, into 'the unprofitable contest of who can do the other most harm,' or submit to work for such prices as the latter may choose to give. Hence, precisely the same oppressive consequences to this class, as would result to the community from a confederacy among the bakers to extort an exorbitant price for bread, which every one will acknowledge to be indictable. The laboring classes purchase their bread with their labor, or, what is the same thing, they give their labor for the money with which they purchase bread, and it is evident the more labor is depreciated the more of it will be required to purchase any given quantity of bread. It must be evident, therefore, that an association is criminal when its object is to depress the price of labor below what it would bring if it were left without artificial excitement by either masters or journeymen, to take its chance in the market. But the motive may also be as important to avoid as to induce an inference of criminality. The mere act of combining to change the price of labor is, perhaps, evidence of impropriety of intention, but not conclusive; for if the accused can show that the object was not to give an undue value to labor, but to foil their antagonists in an attempt to assign to it, by

surreptitious means, a value which it would not otherwise have, they will make out a good defense. In the trial of the journeymen shoemakers of Philadelphia, the recorder, a lawyer of undoubted talents, instructed the jury that it was 'no matter what the defendants' motives were, whether to resist the supposed oppression of their masters, or to insist upon extravagant wages.' But this, although perfectly true as applicable to that case, where the combination was intended not only to coerce employers but third persons, is not of universal application. A combination to resist oppression, not merely supposed but real, would be perfectly innocent; for where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy. It is a fair employment of means not criminal in the abstract, but only so when directed to the attainment of a criminal object; and it is therefore idle to say the law affords a remedy to which the parties must recur; the legal remedy is cumulative, and does not take away the preventive remedy by the act of the parties. It would be an assumption of the question to say it is criminal to do a lawful act by unlawful means, when the object must determine the character of the means. It must therefore be obvious that the point in this case is whether the relators have been actuated by an improper motive; and that being a question purely of fact, I am bound to refer its decision to a jury, the constitutional triers of it; but as I was necessarily led into an examination of principles that might have an unfavorable operation on the relators, I owed it to them, particularly as there was some evidence of combination on the part of the journeymen who prosecute, to state also those principles that may possibly operate in their favor, so that the cause may go before the proper tribunal unprejudiced by any observations of mine. In the mean time I am bound to remand them."¹

§ 426. Combination of journeymen hatters, 1823.²—This was a criminal case tried in the mayor's court in the city of New York. It appeared that the master hatters of the city

¹ "On hearing this decision, the relators applied to be discharged on entering into recognizance for their appearance at the next session of the mayor's court, and, the counsel for the commonwealth consenting, they were accordingly bound in \$200 each."

² *People v. Trequier et al*, 1 Wheel-er's Crim. Cas. 142.

of New York had a meeting and agreed among themselves to reduce wages. To counteract this agreement the employees formed an association and agreed not to work under a certain price. The prosecuting witness was not a member of the association, and the latter refused to work in the same shop with him. The employer offered to put the prosecuting witness at work in another room and did so, but the members of the association finally objected to his being employed at all; whereupon the employer advised the prosecuting witness to apply to be admitted a member of the union, and he did apply but his application was denied, it being claimed that he had worked for less than the regular scale of wages.

§ 427. One of the accused came into the shop where the prosecutor was at work, and began to "blackguard" him, using rough and threatening language. The prosecutor replied he did not wish to be abused and insulted; that he was working for an honest living and at a fair price, and that he was not working for "knocked down wages." The employer testified that he had constant employment for the prosecutor, but that he discharged him solely because the other journeymen refused to work with him; and further it appeared that the prosecutor had not, as a matter of fact, worked for lower wages than the other journeymen employed. As a result the prosecutor was thrown out of employment and deprived of work for some time.¹

¹ Upon proof of the foregoing facts the prosecution rested its case, and the defense offered to prove a conspiracy among the master hatters not to employ any journeymen who left his last place on account of wages, in order to prove that the meeting of the journeymen hatters was for a lawful purpose, and therefore not a conspiracy. The court overruled the evidence, and decided that however objectionable the association and agreement of the employers were, it could not justify the unlawful acts of the journeymen, and refused to hear the evidence.

The defense contended that the doctrine of conspiracy was almost

new in this country, and referred to the case of the cordwainers (of New York city), prosecuted during the administration of the Honorable De Witt Clinton, and decided sometime during the term of his successor; that the doctrine of conspiracy in England could not be tolerated in this country; it had been used as an engine of State there; that an American judge, whose sentiments were incompatible with such principles, could not countenance it. It was contended that the meeting of journeymen hatters was a lawful one; it was for the purpose of counteracting the effects of the meeting and agreement among the master hatters;

§ 428. The charge of the court was as follows: "A conspiracy has been defined to be an agreement or combination between two or more persons to do an unlawful act, or to accomplish a purpose lawful in itself by means that are criminal or unlawful. It is now the most usual remedy for any unlawful combination. The cases put by the counsel for the defendants do not apply to the present case. The meeting of the grocers and others was for a lawful purpose: it was, or was supposed to be, for the general advantage of the community. The object of their association was not directed to the injury or ruin of any one individual. In the case now before the court it appears the object of the conspiracy was directed to the prosecutor alone. They not only remonstrated against his being employed in the same establishment with themselves, but carried their combination to so great an extent as to force the prosecutor to leave his business."

that if the meeting of the employers was lawful, the meeting and proceedings of the journeymen were also lawful. Where, it was asked, would this doctrine of conspiracy end? Instances of a similar nature occurred every day where prosecutions might be instituted, and with success, if this prosecution was successful; and the agreement among the grocers and others not to purchase goods of the auctioneers, etc., was referred to. That the meeting of the journeymen was called for by the previous and unwarrantable agreement among their employers; that there were above one hundred journeymen hatters in the city; and they, without a single exception, viewed the conduct of the masters as oppressive and unjust; that they had beat the journeymen down to less than Birmingham wages, etc.

There is an interesting note to this case, following the original report, the first three paragraphs of which are as follows: "The law relating to conspiracy has undergone a great alteration within a few centuries past. It was taken formerly in a more confined and limited extent than it is

at present. Lord Coke defines it to be 'a consultation or agreement between two or more to appeal or indict an innocent person falsely and maliciously, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men' (3 Inst. 48). This is only one kind of conspiracy, and embraces but a small portion of those offenses now ranked under this title.

"Formerly the most common remedy for this offense was the writ of conspiracy, which has given place to the action on the case for a malicious prosecution, or for slander, and indictment. The writ of conspiracy has become obsolete from the difficulties attending its prosecution. It was necessary, 1st, to show an actual injury to entitle the party to damages; 2d, to prove that the party was lawfully acquitted. But it is presumed it still may be prosecuted.

"The most usual method is now by indictment for conspiracy, and is a most extensive remedy, embracing almost every possible case of unlawful combination."

The counsel for the defendants contended "that the meeting of the master hatters compelled the association among the journeymen to counteract what he called the unwarrantable measures there adopted: that it was an association among the journeymen, in some measure compelled on the part of the masters. It may be answered that one conspiracy cannot justify another: that however objectionable the conduct of the master hatters may be, it is certain that it furnishes no excuse to the defendants."¹

§ 429. Combination of journeymen tailors, 1827.²—The indictment charged:

1. Conspiracy to raise their wages and promote their own interests as journeymen, and to lessen the profits and injure the interests of their employers, the master tailors.

2. Conspiracy to compel their employers to reinstate certain persons who had been discharged for demanding the wages they conceived themselves entitled to, but which the masters in whose employ they had been alleged they had not agreed to pay.

3. Conspiracy to injure, embarrass and obstruct the masters in their lawful business.

4. A general conspiracy to injure and oppress certain journeymen tailors and master workmen who were no parties to the original agreement or to the general combination. The means adopted were:

1. Desisting from work.

2. Assembling in the streets; obstructing workmen in the employ of the masters; using threats and promises to induce them to leave it; pursuing one and assaulting and beating another, and sending a threatening letter to a third.

The recorder charged the jury that "there are two points of view in which the offense of conspiracy may be considered: the one where there exists a combination to do an act, unlawful in itself, to the injury of an individual or of the public, taking the term 'prejudice,' as applicable to an individual, with some

¹The court left it to the jury to say whether the acts of defendants amounted to a conspiracy or not. The jury immediately returned a verdict of guilty against each of the defendants.

²Reported in a pamphlet under the title of "Trial of Twenty-four Journeymen Tailors, charged with a conspiracy, before the mayor's court of the city of Philadelphia, September sessions, 1827."

qualification, and not considered as meaning an injury to the pecuniary interest of another, which may be easily and innocently, and to the public often advantageously, effected by that personal injury which results from the depression of the price of labor by successful competition by others in the same occupation, or from other obvious and natural causes; not considered as that kind of injury and prejudice which a man suffers when he is disappointed in a good bargain or profitable contract, or does not derive the same profit, the usual gain, and often artificial advance on his skill and labor on which he had calculated, either from a monopoly secured, or from other causes which he had supposed were exclusively within his own control. The other is when the act done, or the object of it, was not unlawful, but unlawful means were used to accomplish it, which depends on the common principle that the goodness of the end will not justify improper means to attain it.”¹

As to the legality of the act of leaving the service of the employers unless they would re-employ men who had been discharged, he could discover nothing to constitute a legal crime, if no other consequences were intended to follow than leaving off work, and no illegal means were adopted, and if the rights of other journeymen were not affected. He plainly intimates, however, that the Society of Journeymen Tailors interfered by rules operating oppressively not only on members but on others, or had the society interposed by all the means in their power

¹ “After refusing to accept the English decisions, and rejecting as vague and unsatisfactory the language of Judge Roberts in the Pittsburg case, ‘that when divers persons confederate by indirect means to prejudice a third person, it is a conspiracy,’ he expressly adopts the law as stated by Judge Gibson in *Com. v. Carlisle*, but states: ‘By artificial means I cannot suppose he intended an agreement among the parties themselves not to work for less wages than they had agreed to accept, especially when he says that in the New York case the mayor expressly omits to decide whether such an agreement is indictable *per se*.’ He continues: ‘If there was an agreement among the jour-

neymen to operate on other parties, on innocent third persons, not privy to the original contract, disclaiming its fancied benefits, and unwilling to incur its perils, such an agreement would not be criminal, especially if carried into execution.’ He then proceeds to consider the overt acts, and states that if there was a mere difference of opinion as to the construction of the contract between employers and the journeymen, and the parties to it had refused, the one to work and the other to employ, ‘I am not prepared to say that an agreement to that effect in either, provided it did not extend beyond themselves, would be illegal.’ ”

to compel the employers to re-employ the men discharged, it would present a different case, and be the same in principle as the cases of the boot and shoemakers of Philadelphia, the journeymen cordwainers of New York and the Pittsburg case, where the defendants were all charged as members of associations, the constitutions and by-laws of which became the subjects of investigation and adjudication. He then dwells upon disorderly acts amounting to riot, and especially upon the assembling of the discharged workmen in squads in the streets, following every person who left the establishment of the employers to ascertain who had accepted the work which they had refused, and rules that these were acts of oppression and injustice to individuals who had no part in the controversy, and were therefore criminal.

He sums up the case in these well-chosen words: "These young men have an undoubted right, by agreement among themselves, to regulate their own conduct, to ask as much as they please for their services, to continue or to leave the service of any employer, as reason, inclination or caprice should dictate; but the moment they interfere with the rights and privileges of others, equally valuable and sacred as those which, in this prosecution, these defendants so jealously contend for, they are criminal, and, if the means employed be combination, they become conspirators."¹

§ 430. Combination of journeymen shoemakers, New York, 1835.²—In this case the indictment charged:

1. That the accused, journeymen shoemakers, with divers other persons also shoemakers, did, on the 1st day of August, 1833, in the village of Geneva, unlawfully and to the great injury and prejudice of the trade and commerce of the people of the state of New York, form an unlawful club and combination, and conspire together to prevent any journeyman shoemaker in the village of Geneva from working in his trade below certain wages prescribed by the accused and their confederates.

2. That they made certain unlawful and arbitrary laws and rules, unlawfully intending to regulate and control themselves and other journeymen shoemakers engaged in the village of Geneva in respect to the prices of making men's boots.

¹The summary of this case is by what at length, the original report Mr. Carson (p. 154), and is given some being practically unavailable.

²People v. Fisher et al., 14 Wend. 10.

3. That they unlawfully intended to exact and extort from master workmen exorbitant sums for the making of men's boots.¹

4. That they agreed that they would not work for any master shoemaker who should employ any journeyman who should infringe or break any of the said by-laws, unless such journeyman paid a fine of \$10 to the club.²

5. That in pursuance of said conspiracy they agreed that they would not work for any master shoemaker who employed a certain journeyman named Pennock, and that they unlawfully left the employment of a certain employer because he employed said Pennock, whereupon the employer was compelled to dismiss the objectionable workman and refused to employ him.³

¹"By which by-laws, etc., it was declared and established that journeymen shoemakers of the village of Geneva should not make a pair of men's coarse boots for a less price or hire than one dollar per pair, and if any journeyman shoemaker did work for less than one dollar per pair that he should forfeit and pay to the club or association the penalty of ten dollars."

²"It is then alleged that one Thomas J. Pennock, being a journeyman shoemaker at the village of Geneva, on the 21st day of August, at, etc., broke one of the by-laws by making ten pair of men's coarse boots for one Daniel L. Lum, a master shoemaker at Geneva, at and for the price of 75-100 per pair, and refused to pay the penalty of ten dollars; that after Pennock had thus broken the by-laws, Lum, on the 31st day of August, employed him in the way of his trade of a journeyman shoemaker to make men's coarse boots at and for the price of 75-100 per pair, and the defendants, in pursuance of the said unlawful conspiracy, combination and agreement, afterwards on the same day left the employ of Lum, with whom they had theretofore worked by his employment in the trade and business of journeymen

boot and shoemakers, and refused to work for him in the said trade, etc., as they theretofore had been accustomed to do, because, and for the sole and only reason, that Lum had employed and then continued to employ Pennock to make boots for him after Pennock had broken the by-laws, etc., to the great injury of the trade and against the peace of the people of the state of New York."

³On behalf of the accused it was urged that: "A mere agreement, without some act in pursuance of it, is not a conspiracy. A conspiracy, therefore, cannot exist by mere refraining, omitting or refusing to do an act. 2 R. S. 693, § 10. The subject-matter of the conspiracy here is merely the price of making men's coarse boots, and the consummation alleged is the refusal, etc. The allegations in the indictment that the defendants conspired to prevent journeymen, etc., from making boots and shoes below certain prices, and to extort from master workmen and to injure trade, etc., are the statements of legal inferences merely, or are, at all events, qualified by and limited to the mode charged, and do not *per se* constitute a substantive ground of indictment. The course of proceeding contemplated by the defend-

§ 431. Referring to the question whether or not a combination to raise wages is an act injurious to trade or commerce, the court held broadly that such a combination was an indictable offense at common law; that while the immediate object

ants was not 'injurious to trade or commerce' within the meaning of the statute. It is not within the words of the act. The expressions, 'trade' or 'commerce' are synonymous, and do not refer to the mechanic arts, consequently do not embrace this case. It is not within the spirit of the act. The act could never have been intended to apply to a controversy between master and journeymen mechanics as to the price of making some particular article, the agreement as to which is the gist of the indictment in this case. The words of the act can be fully satisfied without extending them to this case. The end conspired to be attained, and the means conspired to attain it, must be alike unlawful. It is denied in this case that either the end or the means was unlawful. The principle of the indictment is arbitrary and unjust, and if sustained would lead to a direct interference with and abridgment of the rights of the citizen. It would be the precursor of multitudes of idle prosecutions."

The case turned largely upon a certain section of the Revised Statutes of the state of New York then in force, referring to which the court, by Savage, C. J., said: "The only question, therefore, is the one decided by the court below, whether the offense charged is indictable. The legislature have given us their definition of conspiracies and abrogated the common law on the subject. We must therefore see whether this case comes within the statute. The legislature have said: 'If two or more persons shall conspire, either (1) to commit any offense; or (2)

falsely and maliciously to indict another for any offense, or to procure another to be charged or arrested for any such offense; or (3) falsely to move or maintain any suit; or (4) to cheat and defraud any person of any property by any means which are in themselves criminal; or (5) to cheat and defraud any person of any property, by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretenses; or (6) to commit any act injurious to the public health, to public morals, or to trade or commerce; or for the perversion or obstruction of justice or the due administration of the laws,—they shall be deemed guilty of a misdemeanor.' 2 R. S. 691, § 8. And in section 9 it is declared that 'no conspiracies, other than such as are enumerated in the last section, are punishable criminally.' If the conspiracy charged in the indictment is an offense under this statute, it must be embraced under the sixth subdivision, and is an act injurious to trade or commerce. The conspiracy in this case was not to commit an offense within the meaning of the statute; the raising of wages is no offense—the conspiracy is the offense, if any has been committed; nor was the object to indict any one; to move or maintain a suit; to cheat any one by criminal means, or by any means which, if executed, would amount to a cheat; nor to obstruct the course of justice or the administration of the laws."

From the opinion: "The words *trade* and *commerce* are said by Jacobs, in his law dictionary, not to be synonymous; that commerce relates to dealings with foreign nations;

in such cases is to benefit the conspirators, yet if their individual benefit is to work a public injury the combination amounts to a conspiracy against the spirit of the common law.

§ 432. Referring to the economic considerations underlying the conclusions reached, the court said: "Whatever disputes

trade, on the contrary, means mutual traffic among ourselves, or the buying, selling or exchange of articles between members of the same community. That the raising of wages and a conspiracy, confederacy or mutual agreement among journeymen for that purpose is a matter of public concern, and in which the public have a deep interest, there can be no doubt. That it was an indictable offense at common law is established by legal adjudications. In *The King v. Journeymen Tailors of Cambridge*, 8 Mod. 11, the defendants were indicted for a conspiracy among themselves to raise their wages; they were found guilty, and moved in arrest, among other things, that no crime appeared upon the face of the indictment. To this the court answer that it is true that the indictment sets forth that the defendants denied to work under such wages as they demanded, but it was not for the denial, but the conspiracy, they were indicted; and the court add that a conspiracy of any kind is illegal, though the matter about which they conspired might have been lawful for them or any of them to do without a conspiracy, and they refer to the case of the *Tubwomen v. The Brewers of London*. This case has been cited as sound law by all subsequent writers on criminal law. *The People v. Trequier and others*, 1 Wheel. Crim. Cas. 142, was an indictment against the defendants for a conspiracy to cause one Acker to be discharged from employment as a hatter, and refusing to work for their employers unless they would discharge Acker, be-

cause, as they alleged, he, Acker, worked for 'knocked down wages.' The facts of the case were much like the present, except that the defendants there were hatters and here they are shoemakers. The counsel for the defendants contended that the doctrine of conspiracy was not applicable in this country. The defendants were convicted.

"Journeymen may each singly refuse to work unless they receive an advance of wages, but if they do so by concert or association they may be punished for conspiracy (6 T. R. 636). Such was the construction of the common law; but in England the subject has been thought sufficiently important to require the special attention of the legislature, and statutes were enacted in the reign of Edward VI. and George III. which subject workmen, conspiring either to reduce the time of labor or to raise their wages, to the punishment of fine and imprisonment. I have found but few adjudications upon this subject, but precedents, in the absence of adjudications, are some evidence of what the law is. Among these we find precedents at common law against journeymen for conspiring to raise their wages and lessen the time of labor, and to compel masters to pay for a whole day's work; against journeymen lamp-lighters for conspiring to raise wages, and against journeymen carriers for the like offense (3 Chit. Crim. Law, 1163, and note 9); against salt-makers for conspiring to enhance the price of salt; against journeymen serge-weavers for refusing to work for a master who had employed a man

may exist among political economists upon the point, I think there can be no doubt, in a legal sense, but that the wages of labor compose a material portion of the value of manufactured articles. The products of mechanical labor compose a large proportion of the materials with which trade is carried on. By trade I now understand traffic or mutual dealings between members of the same community, or internal trade. Coarse boots and shoes are made in many parts of our country; not for particular persons who are to wear them, but as an article of trade and commerce. Probably such is the case in Geneva, where this offense was committed.

“If journeymen bootmakers, by extravagant demands for wages, so enhance the price of boots made in Geneva, for instance, that boots made elsewhere, in Auburn for example, can be sold cheaper, is not such an act injurious to trade? It is surely so to the trade of Geneva in that particular article, and that, I apprehend, is all that is necessary to bring the of-

contrary to certain rules entered into, by conspiracy; against journeymen leather-dressers for conspiring to induce a man to turn a person out of his employment; against masters rope-makers for conspiring not to employ journeymen who had left their last master without his consent.

“Some of these offenses seem to have had for their object the oppression and injury of an individual; others were calculated to injure the public. The immediate object in those cases, as in this, probably was to benefit the conspirators themselves; but if their individual benefit is to work a public injury, a conspiracy for such an object is against the spirit of the common law. The offense of conspiracy seems to have been left in greater uncertainty by the common law than most other offenses. Mr. Chitty states that all confederacies wrongfully to injure another in any manner are misdemeanors. So the law was understood by this court until the decision of the case of *Lambert v. The People*,

9 Cow. 578. The judgment of this court was reserved in that case by the casting vote of the president of the court for the correction of errors, but whether on the ground that a conspiracy to defraud an individual was not indictable, or on the ground that the indictment was defective in omitting to state the means by which the fraud was effected, it is impossible from the report of the case to ascertain; and the question was left in doubt whether an indictment lies for a conspiracy to produce a mere private injury by means which are not in themselves criminal, and which would not affect the public nor obstruct public justice. That question was intended to be put at rest by the Revised Statutes; and we have the authority of the revisers for saying that this is the only particular in which a departure from the common-law doctrine was intended, if, indeed, the common law was as it was understood by this court. See revisers' note to part 4, ch. 1, tit. 6.”

fense within the statute. It is important to the best interests of society that the price of labor be left to regulate itself, or rather be limited by the demand for it. Combinations and confederacies to enhance or reduce the prices of labor, or of any articles of trade or commerce, are injurious. They may be oppressive by compelling the public to give more for an article of necessity or convenience than it is worth; or, on the other hand, of compelling the labor of the mechanic for less than its value. Without any officious and improper interference on the subject, the price of labor or the wages of mechanics will be regulated by the demand for the manufactured article and the value of that which is paid for it; but the right does not exist either to enhance the price of the article or the wages of the mechanic by any forced and artificial means. The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair, but he has no right to say that no other mechanic shall make them for less. The cloth merchant may say that he will not sell his goods for less than so much per yard, but has no right to say that any other merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object are injurious not only to the individual particularly oppressed, but to the public at large. In the present case an industrious man was driven out of employment by the unlawful measures pursued by the defendants, and an injury done to the community by diminishing the quantity of productive labor and of internal trade. In so far as the individual sustains an injury, the remedy by indictment is taken away by our revised statutes and the sufferer is left to his action on the case; but in so far as the public are concerned in the embarrassment to trade by the discouragement of industry, the defendants are liable to punishment by indictment.

“If combinations of this description are lawful in Geneva, they are so in every other place. If the bootmakers may say that boots shall not be made for less than one dollar per pair, it is optional with them to say that ten or even fifty dollars

shall be paid, and no man can wear a pair of boots without giving such price as journeymen bootmakers may choose to require. This, I apprehend, would be a monopoly of the most odious kind. The journeymen mechanics might, by fixing their own wages, regulate the price of all manufactured articles, and the community be enormously taxed. Should the journeymen bakers refuse to work unless for enormous wages which the master bakers could not afford to pay, and should they compel all the journeymen in a city to stop work, the whole population must be without bread. So of journeymen tailors or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be considered 'injurious to trade.' Such consequences would follow were such combinations universal. It is true that no great danger is to be apprehended on account of the impracticability of such universal combinations. But if universally or even generally entered into, they would be prejudicial to trade and to the public; they are wrong in each particular case. The truth is that industry requires no such means to support it. Competition is the life of trade. If the defendants cannot make coarse boots for less than one dollar per pair, let them refuse to do so; but let them not directly or indirectly undertake to say that others shall not do the work for a less price. It may be that Pennock, from greater industry or greater skill, made more profit by making boots at seventy-five cents per pair than the defendants at a dollar. He had a right to work for what he pleased. His employer had a right to employ him for such price as they could agree upon. The interference of the defendants was unlawful; its tendency is not only to individual oppression, but to public inconvenience and embarrassment."

§ 433. **Combination among journeymen shoemakers, Massachusetts, 1842.**¹—It is in this case that Chief Justice Shaw gave his much-quoted definition of conspiracy, and the case has been so often referred to that it may be considered a leading case in America. Seven journeymen bootmakers were indicted for conspiracy, it being charged that they confederated and formed themselves into a club, and agreed together not to work for any master bootmaker or other person who should employ any journeyman or other workman who should not be

¹ Com. v. Hunt et al., 4 Met. 111.

a member of said club, after notice given to such master or other person to discharge such workmen; and by means of such conspiracy did compel a certain employer to dismiss a certain employee because the employee had not conformed to certain rules of the association. In passing upon the sufficiency of the indictment the court said: "Without attempting to review and reconcile all the cases, we are of opinion that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the term 'criminal or unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment."¹

¹ In this connection the court goes on to say: "But yet it is clear that it is not every combination to do unlawful acts, to the prejudice of another by a concerted action, which is punishable as conspiracy. Such was the case of *The King v. Turner*, 13 East, 228, which was a combination to commit a trespass on the land of another, though alleged to be with force, and by striking terror by carrying offensive weapons in the night. The conclusion to which Mr. Chitty comes, in his elaborate work on Criminal Law, vol. III, p. 1140, after an enumeration of the leading authorities, is that 'we can rest, therefore, only on the individual cases decided, which depend, in general, on particular circumstances, and which are not to be extended.'

"The American cases are not much more satisfactory. The leading one is that of *Lambert v. People of New York*, 9 Cow. 578. On the principal point the court of errors were equally divided, and the case was decided in favor of the plaintiff in error, who

had been convicted before the supreme court, by the casting vote of the president. The principal question was whether an indictment charging that several persons, intending unlawfully, by indirect means, to cheat and defraud an incorporated company, and divers others unknown, of their effects, did fraudulently and unlawfully conspire together, injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the company and others of divers effects, and that, in execution thereof, they did, by certain undue, indirect and unlawful means, cheat and defraud the company, etc., was a good and valid indictment. As two distinguished senators, and members of the court of errors, took different sides of this question, the subject was fully and elaborately discussed, the authorities were all reviewed, and the case may be referred to as a full and able exposition of the learning on the subject."

The court proceeds (page 134): "Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of bread too high, should propose to him to reduce his prices, or, if he did not, that they would introduce another baker; and on his refusal such other baker should, under their encouragement, set up a rival establishment and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all combination in every branch of trade and industry; and yet it is through that competition that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances where each strives to gain custom to himself, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

"We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet, so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that, if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; and as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment. If the same rule were to prevail in criminal which holds in civil proceedings — that a case defectively stated may be aided by a verdict — then a court might presume, after verdict, that the indictment was sup-

ported by proof of criminal or unlawful means to effect the object. But it is an established rule in criminal cases that the indictment must state a complete indictable offense, and cannot be aided by the proof offered at the trial.”¹

¹It being urged on behalf of the defendants that Massachusetts had no statute concerning conspiracy, the facts alleged in the indictment constituted an offense, if any, at common law; and it was urged that the English common law of conspiracy was not in force in Massachusetts; the following being the gist of the argument of counsel for defendants on this point:

“We have not adopted the whole mass of the common law of England, indiscriminately, nor of the English statute law which passed either before or after the settlement of our country. So much only of the common law has been adopted as is applicable to our situation, excluding ‘the artificial refinements and distinctions incident to the property of a great commercial people; the laws of revenue and police; such especially as are enforced by penalties.’ 1 Bl. Com. 107 et seq.; 1 Tucker’s Black. Appx. 406. Statutes do not bind colonies unless they are expressly named. 2 P. W. 75; Chit. on Prerog. 33. The English law as to acts in restraint of trade is generally local in its nature, and not suited to our condition. It has never been adopted here, and the colonies are not named in the statutes on that subject which have been passed in England since they were settled. *Van Ness v. Pacard*, 2 Pet. 144; *Wheaton v. Peters*, 8 Pet. 658, 659; *Dawson v. Shaver*, 1 Blackf. 205. The Stats. 1 Edw. VI, ch. 3; 5 Geo. I, ch. 27; 23 Geo. II, ch. 13; 14 Geo. III, ch. 71; the innumerable statutes of laborers, and the statutes against seducing artisans, etc., illustrate this point. All the law we

ever had on these subjects was domestic, and is now obsolete. See *Plymouth Colony Laws*, 28, 72, 76, *Anc. Chart.* 210, 6 Mass. 73.”

Referring to this point Chief Justice Shaw said (page 21): “We have no doubt that by the operation of the constitution of this commonwealth the general rules of the common law making conspiracy an indictable offense are in force here, and that this is included in the description of laws which had before the adoption of the constitution been used and approved in the province, colony or state of Massachusetts Bay, and usually practiced in the courts of law. Const. of Mass., ch. VI, § 6. It was so held in *Commonwealth v. Boynton* and *Commonwealth v. Pierpont* (see statement of these cases in 3 Law R. 295, 296), cases decided before the reports of cases were regularly published, and in many cases since. *Commonwealth v. Ward*, 1 Mass. 473; *Commonwealth v. Judd*, and *Commonwealth v. Tibbetts*, 2 Mass. 329, 536; *Commonwealth v. Warren*, 6 Mass. 74. Still, it is proper in this connection to remark, that although the common law in regard to conspiracy in this commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offense is a precedent for a similar indictment in this state. The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public or portions or classes of the community, or even to the rights of an individual. This rule of law

§ 434. Referring to the illegality of associations the object of which is to advance the interests of labor, the court found that the indictment did not charge a criminal conspiracy punishable by law. In arriving at this conclusion it said (page 128): "Stripped then of these introductory recitals and alleged in-

may be equally in force as a rule of the common law, in England and in this commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship — not being adapted to the circumstances of our colonial condition — were not adopted, used or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution already cited. This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply to this commonwealth, and show why a conviction in England in many cases would not be a precedent for a like conviction here."

And speaking generally of conspiracy, Chief Justice Shaw said: "From this view of the law respecting conspiracy, we think it an offense which especially demands the application of that wise and humane rule of the common law that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged.

This is required to enable the defendant to meet the charge and prepare for his defense, and, in case of acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense. It is also necessary in order that a person charged by the grand jury for one offense may not substantially be convicted on his trial of another. This fundamental rule is confirmed by the Declaration of Rights, which declares that no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally described to him.

"From these views of the rules of criminal pleading it appears to us to follow as a necessary legal conclusion that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offense which is intended to be charged consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood or other criminal or unlawful means, such intended use of fraud, force, falsehood or other criminal or unlawful means must be set out in the indictment. Such, we think, is on the whole the result of the English authorities, although they are not quite uniform. 1 East, P. C. 461; 1 Stark. Crim. PL (2d ed.) 156; Opinion of Spencer, Senator, 9 Cow. 586 et seq."

jurious consequences, and of the qualifying epithets attached to the facts, the averment is this: that the defendants and others formed themselves into a society and agreed not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman. The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those who become members of an association with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed, object of the association was criminal. An association may be formed the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so is to be averred and proved as the gist of the offense. But when an association is formed for purposes actually innocent, and afterwards its powers are abused by those who have the control and management of it to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case no such secret agreement varying the objects of the association from those avowed is set forth in this count of the indictment.

“Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were that they would not work for a person who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive that it is criminal for men to agree together to exercise their own acknowledged rights in such a manner as best to subserve their own interests. One way to test this is to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman who should still persist in the use of ardent spirit would find it more difficult to get employment; a master employing such an one might at times experience inconvenience in his work in losing the services of a skilful but intemperate workman. Still it seems to us that, as the object would be lawful and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy.”¹

¹ Regarding the allegation in the indictment that the employer was compelled by unlawful conspiracy to discharge another employee by the name of Horne, Justice Shaw said (p. 132):

“If this is to be considered as a substantive charge, it would depend altogether upon the force of the word ‘compel,’ which may be used in the sense of coercion or duress, by force or fraud. It would therefore depend upon the context and the connection

with other words to determine the sense in which it was used in the indictment. If, for instance, the indictment had averred a conspiracy by the defendants to compel Wait to turn Horne out of his employment, and to accomplish that object by the use of force or fraud, it would have been a very different case, especially if it might be fairly construed, as perhaps in that case it might have been, that Wait was under obligation, by contract, for an unexpired term of time,

§ 435. The right of association as sustained by this leading case is limited only by the proposition that the association must not be for unlawful or oppressive purposes; and if formed for lawful purposes it must not thereafter by secret rules, laws or regulations degenerate into a conspiracy, otherwise it will be pronounced illegal, and the parties thereto liable to prosecution and conviction.

§ 436. **Combination of curriers, 1867.**¹— Certain employees engaged in the manufacture of patent leather were indicted for forming a combination to unlawfully control their employers and compel them to dismiss from employment certain objectionable employees; and they were charged with unlawfully conspiring and agreeing together to strike and remain out until the objectionable employees were dismissed. The employers refused to discharge the men, whereupon the accused struck. The case came before the New Jersey supreme court on a motion to quash an indictment. Concerning the offense charged and the indictment the supreme court said: "The substantial offense charged is that the defendants combined to compel their employer to discharge certain of their fellow-workmen, the means adopted to force this concession being an announced

to employ and pay Horne. As before remarked, it would have been a conspiracy to do an unlawful though not a criminal act to induce Wait to violate his engagement to the actual injury of Horne. To mark the difference between the case of a journeyman or a servant and master mutually bound by contract, and the same parties when free to engage anew, I should have before cited the case of *Boston Glass Co. v. Binney*, 4 Pick. 425. In that case it was held actionable to entice another person's hired servant to quit his employment during the time for which he was engaged, but not actionable to treat with such hired servant, whilst actually hired and employed by another, to leave his service and engage in the employment of the person making the proposal, when the term for which he is engaged shall expire. It acknowledges the established prin-

ciple that every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract. But whatever might be the force of the word 'compel,' unexplained by its connection, it is disarmed and rendered harmless by the precise statement of the means by which such compulsion was to be effected. It was the agreement not to work for him by which they compelled Wait to decline employing Horne longer. On both of these grounds we are of opinion that the statement made in this second count, that the unlawful agreement was carried into execution, makes no essential difference between this and the first count."

¹ *State v. Donaldson et al.*, 82 N. J. L. 151.

determination to quit their employment in a body and by a simultaneous act. On the argument before this court, counsel in behalf of the state endeavored to sustain the indictability of this charge on the plea that the thing thus agreed to be done was an injury to trade, and consequently came within the express language of the statute on the subject of conspiracy.¹ But I cannot concur in this view. An act to fall within this provision must be one which, with directness, inflicts an injury on trade; as, for example, a combination to depress any branch of trade by false rumors. But in the case before us, the act charged, if it could be said to injure trade at all, did so not proximately but remotely. It is true that, at a far remove, an injury to an individual manufacturer may affect trade injuriously; but, in the same sense, so it is true, will an injury inflicted on a consumer of manufactured articles. But it is not this undesigned and incidental damage which is embraced within the statutory denunciation. On this account I think the indictment does not present an affair which can be comprehended by the clause of the act which in this respect was relied on. But as it has already been decided by this court that the statute in question has not superseded the common law with regard to the crime of conspiracy,² the question still remains to be resolved whether the facts charged on this record do not constitute such crime upon general principles.”³

¹ Nix. Dig. 187, 61.

² State v. Norton, 3 Zab. 40.

³ Speaking of the indictment the court said: “In substance, the indictment in this case is similar to that in *Rex v. Ferguson and Edge*, 2 Stark. R. 489. Nor were the circumstances unlike; for in the reported case the defendants were charged at common law with combining to quit and turn out from their employment, in order to prevent their employer from taking apprentices; and although the case, after trial and conviction, was mooted in the King’s Bench on points of evidence, no doubts were suggested as to the indictable nature of the offense, and the defendants were accordingly fined and imprisoned. So in *Rex v. Bykerdyke*, 1 M. & Rob.

179, the same doctrine was maintained. The indictment charged that the defendant, with others, conspired to prevent certain hands from working in the colliery; and the evidence showed that the body of the men met and agreed upon a letter addressed to their employer, to the effect that all the workmen would strike in fourteen days unless the obnoxious men were discharged from the colliery; and Patterson, justice, held that these workmen had no right to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal. These two cases, it will be observed, sustain with entire aptness the opinion above expressed, and I have not

§ 437. The decision of the court may be summarized as follows:

1. There are comparatively few cases of combinations which are punishable by public prosecution unless there is an indict-

found any of an opposite tendency. As to the case of *Commonwealth v. Hunt*, 4 Met. 111, it is clearly distinguishable, and I concur entirely, as well with the principles embodied in the opinion which was read in the case as in the result which was attained. The foundation of the indictment in that case was the formation of a club by journeymen bootmakers, one of the regulations of which was, that no person belonging to it should work for any master workman who should employ any journeyman or other workman who should not be a member of such club. Such a combination does not appear to possess any feature of illegality, for the law will not intend, without proof, that it was formed for the accomplishment of any illegal end. 'Such an association,' says Chief Justice Shaw, in his opinion, 'might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral or social condition; or to make improvements in their art; or for other purposes.' The force of this association was not concentrated with a view to be exerted to oppress any individual, and it was consequently entirely unlike the case of men who take advantage of their position to use the power, by a concert of action, which such position gives them, to compel their employer to a certain line of conduct. The object of the club was to establish a general rule for the regulation of its members; but the object of the combination, in the case now before this court, was to occasion a particular result which was mischievous, and by means which were oppressive.

The two cases are not parallel, and must be governed by entirely different considerations."

Concerning the nature of the crime of conspiracy, the court by Beasley, C. J., said: "There is, perhaps, no crime, an exact definition of which it is more difficult to give than the offense of conspiracy. That a combination of persons to effect an act, itself of an indictable nature, will constitute this crime, is clear; nor is there any more doubt that, though the purpose the confederacy is designed to accomplish be not criminal, yet if the means adopted be of an indictable character, this offense is likewise committed. Thus far the limits are clearly defined, and embrace, without exception, all cases which fall within them. But when we proceed one step beyond the lines thus marked out, the cases which have been adjudged to be conspiracies appear to stand apart by themselves, and are devoid of that analogy to each other which would render them susceptible of classification. It is certain, however, that there are a number of cases, in which neither the purpose intended to be accomplished nor the means designed to be used were criminal, which have been regarded to be indictable conspiracies. And yet it is obvious that, in the nature of things, it cannot be every collusion between two or more persons to do an unlawful act, or an indifferent act by unlawful means, which will constitute an offense of a public nature; for if this were so, a large portion of the transactions which, in the ordinary course of litigation between party and party, comes before the courts, would assume a criminal as-

able element either in the end in view or in the means to be employed.

2. A conspiracy to defraud individuals of their property or to commit private injury is in certain cases an indictable offense, though neither the object in view nor the means to be employed is indictable.

3. Great practical difficulty, however, is experienced whenever any attempt is made to lay down any general rules by which to discriminate between that class of combinations in

pect, in which the state would have an interest. Indeed, I think it may be said that there are, comparatively, but few cases of combinations in which indictability does not attach, either to the end in view or to the instrumentalities devised, which are punishable by a public prosecution. It is true that, running to an extreme, in the case of *State v. Rickey*, 4 Halst. 293, Mr. Justice Ford insisted that, up to his day, there was but a single case extant — that of *Rex v. Cope et al.*, 1 Strange, 144,—which held that an indictment for a conspiracy would lie for a combination of two or more to commit a private injury which was not a public wrong; and he further insisted that the case referred to was erroneously decided; but Mr. Justice Ryerson did not, as is evident from the grounds upon which he rests his judgment, concur in that view; and the course of reasoning adopted by Mr. Justice Ford is now very generally admitted to be fallacious. In the case of *State v. Norton*, 3 Zab. 44, the view of the law expressed by Mr. Justice Ford is disapproved of, and Chief Justice Green, in stating his conclusion, after an examination of the subject, remarks, ‘the great weight of authority, the adjudged cases no less than the most approved elementary writers, sustain the position that a conspiracy to defraud individuals or a corporation of their property may, in itself, constitute an indictable offense, though the

act done, or proposed to be done in pursuance of the conspiracy, be not in itself indictable.’

“The rule of law thus enunciated appears to me to be the correct one. There are a number of cases which cannot be sustained upon any other doctrine. To this class belongs the decision that it was a conspiracy to induce a young female, by false representations, to leave the protection of the house of her parent, in order to facilitate her prostitution. *Rex v. Lord Grey*, 3 Hargrave’s State Trials, 519; *Rex v. Sir Francis Deleval et al.*, 3 Burr. 1434. So a conspiracy to impoverish a tailor and prevent him, by indirect means, from carrying on his trade. *The King v. Eccles*, 8 Dougl. 337. So a conspiracy to marry paupers, with a view to charge one parish and exonerate another (*Rex v. Tarrent*, 4 Burr. 2106); or to charge a man with being the father of a bastard (*Rex v. Armstrong*, 1 Vent. 304; *Rex v. Kimberty*, 1 Lev. 62; *Rex v. Timberly*, Sid. 68); or a combination to impoverish a class of persons (*Rex v. Sterling*, 1 Lev. 125; s. c., Sid. 174). These are all cases, it will be noticed, in which the act which formed the foundation of the indictment would not, in law, have constituted a crime if such act had been done by an individual, the combination being alone the quality of the transactions which made them respectively indictable.”

which there is an indictable element in either the means or the object and that class of combinations wherein there is no criminal element in either the means or the object.

4. But this may be said: That a combination will be an indictable conspiracy whenever the end proposed or the means to be employed are of a criminal character; or where they are such as to indicate great malice in the confederates; or where deceit is to be used, the object in view being unlawful; or where the confederacy, having no lawful aims, tends simply to the oppression of individuals.

5. A combination to dictate to an employer whom he shall discharge from his employ is unlawful. It is an unwarrantable interference with the conduct of the employer's business, and the effect of such interference must be highly injurious.¹

¹In this connection Justice Beasley said: "It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to his employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. It is no answer to the above considerations to say that the employer is not compelled to submit to the demand of his employees; that the penalty of refusal is simply that they will leave his service. There is this coercion: the men agree to leave simultaneously, in large numbers and by preconcerted action. We cannot close our eyes to the fact that the threat of workmen to quit the

manufacturer under these circumstances is equivalent to a threat that, unless he yield to their unjustifiable demand, they will derange his business, and thus cast a heavy loss upon him. The workmen who make this threat understand it in this sense, and so does the employer. In such a condition of affairs it is idle to suggest that the manufacturer is free to reject the terms which the confederates offer. In the natural position of things, each man acting as an individual, there would be no coercion; and if a single employee should demand the discharge of a co-employee, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees it would be but a waste of time to pause to prove that in most cases he must submit, under pain of often the most ruinous losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of

6. A combination the object of which is to bring the combined force of the confederates to bear upon their employer to compel the discharge of objectionable workmen amounts to a conspiracy, the object being oppressive and mischievous.

§ 438. The rigor of this decision has been greatly modified by statutes and later decisions. Generally speaking it is no longer a criminal conspiracy in most of the states for employees to combine and threaten to strike if certain other employees are not discharged, and according to the views hereinbefore expressed such a combination never should have been held indictable, since the purposes of the combination were not criminal.

§ 439. It is not a crime for one employee to threaten to quit work unless another is discharged; neither is it a crime for two or more employees to agree to quit in a body unless some other employee is discharged, and it is a perversion of the criminal law to hold that such a combination is a criminal conspiracy; but such a combination is a civil conspiracy, since it is a combination to injure and oppress another, and the injured employees have their action on the case to recover damages sustained; the fact that their remedy may be of doubtful practical value cannot alter the law and make a combination criminal that is not criminal.

§ 440. **Combination of journeymen freestone cutters, 1870.**¹ This was a civil action to recover back the sum of \$500, the amount of a fine which plaintiff had been compelled to pay. The defendants were members of the Journeymen Freestone Cutters' Association of Boston, an unincorporated association. The plaintiff was a freestone cutter and had contracted to furnish cut stone for various buildings at a certain price. The defendants with a number of other skilled workmen and certain apprentices were employed upon the work. The association imposed a fine of \$500 upon the plaintiff because he had sent to New York to be executed some of the freestone cutting, and upon his refusal to pay the fine the de-

their position, to control the business of another. I am unwilling to hold that a right which cannot in any event be advantageous to the employee, and which must be always hurtful to the employer, exists in law. In my opinion this indictment

sufficiently shows that the force of the confederates was brought to bear upon their employer for the purpose of oppression and mischief, and that this amounts to a conspiracy."

¹Carew v. Rutherford et al., 106 Mass. 1.

fendants and all the journeymen freestone cutters struck, according to the rules of the association and a vote of that body.¹

§ 441. The supreme court, in passing upon the question whether or not the acts charged and proven were unlawful at common law, held that they were, saying: "One of the aims of the common law has always been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others; and it has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege which he has. Many illustrations of this doctrine are given in Bac. Ab., Actions on the Case, F., among which are the following: 'If A., being a mason and using to sell stones, is possessed of a certain stone-pit, and

¹The constitution and laws of the association are set out quite fully on pp. 4-6 of the original report of the case.

"The plaintiff refused to pay, and all his men left his shop at once in a body under the lead of Cooney and Shea; and the plaintiff was without men for a week or ten days, and until after he had made the payment of \$500 as hereinafter stated. Previously to the payment of the money, and after the men had left him, Cooney and others of the defendants told the plaintiff that neither these men nor any association of men would be allowed to work in his shop if he refused to pay the money demanded. In consequence of the withdrawal of the defendants and the other journeymen, the freestone cutting which the plaintiff had contracted to do was stopped, because it was impossible for the plaintiff to procure journeymen or other freestone cutters who were not members of said association, and who had such skill as was required for the fulfillment of his contracts. Several days after the defendants and the other journeymen had withdrawn from the plaintiff's service, the plaintiff, induced by the necessity of doing so to fulfill said contracts and continue his other

stonecutting work, paid to the defendants to the use of said association the sum of \$500 on August 26, 1868; and the defendants and other journeymen who had withdrawn as aforesaid returned to the service and employment of the plaintiff. Said payment was made by the plaintiff as follows: He first made a check payable to the order of the association. This the defendants Cooney and Wagner refused to take, on the ground that no one of those active in procuring it was willing to indorse it. The plaintiff then made a check payable to Wagner or bearer, and gave this check to Cooney, and he, Wagner and others went with the plaintiff to the bank, when the money was passed to Wagner's credit as treasurer of the association. No receipt was given to the plaintiff for this money.

"The judge further found as a fact that the money demanded of the plaintiff was demanded without right, and not under any contract or agreement between him and the defendants. Upon these findings the judge ruled that the facts would not sustain the action, and ordered judgment for the defendants. The plaintiff alleged exceptions." *Carew v. Rutherford, supra.*

B., intending to discredit it and deprive him of the profits of the said mine, imposes so great threats upon his workmen and disturbs all comers, threatening to maim and vex them with suits if they buy any stones, so that some desist from working and others from buying, A. shall have an action upon the case against B., for the profit of his mine is thereby impaired.' So 'if a man menaces my tenants at will of life and member *per quod* they depart from their tenures, an action upon the case lies against him.' 'If a man discharges guns near my decoy pond with design to damnify me by frightening away the wild fowl resorting thereto, and the wild fowl are thereby frightened away, and I am damnified, an action on the case lies against him.' Slander as to one's profession or title is a wrong of a similar character.

"The illustrations given in former times relate to such methods of doing injury to others as were then practiced, and to the kinds of remedy then existing. But as new methods of doing injury to others are invented in modern times, the same principles must be applied to them in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges, and existing forms of remedy must be used."

The opinion continues: "We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this so that he is induced to pay the money demanded under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back, and, if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated. The principle does not interfere with the freedom of business, but protects it. Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can.

He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without any unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions.”¹

§ 442. **Combination to resist encroachments of employers, 1873.**²—A certain voluntary and unincorporated association of journeymen shoemakers was organized, one of the declared

¹ Citing *Com. v. Hunt*, 4 Met. 111; *Boston Glass Mfg. Co. v. Binney*, 4 Pick. 425; *Bowen v. Matheson*, 14 Allen, 499. The court further says:

“This freedom of labor and business has not always existed. When our ancestors came here many branches of labor and business were hampered by legal restrictions created by English statutes; and it was a long time before the community fully understood the importance of freedom in this respect. Some of our early legislation is of this character. One of the colonial acts, entitled ‘An act against oppression,’ punished by fine and imprisonment such indisposed persons as may take the liberty to oppress and wrong their neighbors by taking excessive wages for their work, or unreasonable prices for merchandises or other necessary commodities as may pass from man to man. *Anc. Chart.* 172. Another required artificers, or handicraftmen meet to labor, to work by the day for their neighbors, in mowing, reaping of corn, and the inning thereof. *Id.* 210. Another act regulated the price of bread. *Id.* 752. Some of our town records show that, under the power to make by-laws, the town fixed the prices of labor, provisions, and several articles of merchandise, as late as the time of the revolutionary war. But experience and increasing intelligence led to the abolition of all

such restrictions, and to the establishment of freedom for all branches of labor and business; and all persons who have born and educated here, and are obliged to begin life without property, know that freedom to choose their own occupation, and to make their own contracts, not only elevates their condition, but secures to skill and industry and economy their appropriate advantages.

“Freedom is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury, for the sake of compelling him to buy his peace; or, in the language of the statute cited above, ‘with intent to extort money or any pecuniary advantage whatever or to compel him to do any act against his will.’ The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country; and if such practices could enjoy impunity they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both.” *Carew v. Rutherford*, *supra*.

² *Snow et al. v. Wheeler et al.*, 113 Mass. 179.

objects of which was "to rescue our trade from the condition it has fallen into, and to raise ourselves to that respectable position in society that we, as free citizens, are entitled to, and to secure us forever against any further encroachments from manufacturers." Among the agreements of the association was one "not to teach or cause to be taught any new hand any part or parts of the boot or shoe trade without the permission of the lodge of which I am a member."

§ 443. The case as presented to the court was brought on behalf of the association to recover certain funds which the defendants withheld from the association. The plaintiffs were entitled to recover the money thus detained by the parties who received it in a fiduciary capacity, unless it should appear that the money was paid over for a purpose immoral, illegal or contrary to public policy, and it was insisted that the agreements above recited were in unlawful restraint of trade and illegal as against public policy; but the supreme court held that the point was not well taken, saying: "In the relations existing between labor and capital, the attempt by co-operation on the one side to increase wages by diminishing competition, or on the other to increase the profits due to capital, is within certain limits lawful and proper. It ceases to be so when unlawful coercion is employed to control the freedom of the individual in disposing of his labor or capital. It is not easy to give a definition which shall include every form of such coercion; it is enough that in the compact before us there is no evidence of any purpose to use such unlawful means in any form."

"In the case at bar there is no evidence afforded by the documents submitted to us that the purposes of this association are unlawful by the rule stated. Unlawful coercion certainly does not appear to be intended. And the right of the members to instruct whom they choose in the mysteries of their trade cannot be denied. The case presented is not one where there is evidence to justify us in finding that the objects and purposes of the association are fraudulently and colorably declared as a cover for a secret unlawful agreement of its members. It will be time enough to deal with such a case when it arises. In this view it is not necessary critically to examine the instances of alleged illegal conduct which it is said are found upon the records of the association, or to inquire whether they amount

to illegal restraint of that freedom in trade which the law secures to all, because specific wrongful acts cannot be shown to defeat the plaintiffs' claim, unless it be also shown that such acts come within the scope and purpose of the organization. Each act of wrong, outside the declared and real purpose of the lodge, stands by itself, to be answered for only by those who join in its perpetration."

§ 444. **Combination of stevedores, 1876.**¹ — The association adopted a by-law to the effect that there should be no variation from the prices adopted by the association, and that if any member, after an investigation by a committee, should be found guilty of working for less than the prices fixed, he should forfeit to the association twenty-five per cent. of the amount of such bill as fixed, which penalty might be collected in the name of the corporation by due process of law. The defendant Walsh subscribed to the by-law, but was found guilty by the association of working for less than the recognized price, thereby incurring a penalty of \$125, for the recovery of which an action was brought.²

After referring to the earlier cases the court reached these conclusions:

1. "It is not nor has it ever been a rule of the common law

¹The Master Stevedores' Ass'n v. Walsh, 2 Daly (N. Y. C. P.), 1.

²Referring to *People v. Fisher*, 14 Wend. 9, hereinbefore reviewed (see sec. 430), Judge Daly said: "The feature which distinguishes this case from the one under consideration (namely, *People v. Fisher*) is that coercive measures were there resorted to to compel a compliance, not only on the part of master shoemakers, but of journeymen not members of the association, with the regulations the combination had established. This was undertaking to interfere with the rights of others, and it has frequently been held that combinations to prevent any journeyman from working below certain rates, or to prevent master workmen from employing one except at certain rates, are unlawful, and that the par-

ties engaging in such combination may be indicted for a conspiracy (Case of the Journeymen Cordwainers of the City of New York, printed by J. Riley, New York, 1810; Case of Journeymen Cordwainers of Pittsburgh, printed at Pittsburgh, 1811; Case of the Philadelphia Boot and Shoemakers, Yates' Select Cases, 144; The Philadelphia Journeymen Tailors' Case, Phil., 1827, pp. 103, 160; *People v. Trequier*, 1 Wheeler's Crim. Cases, 142).

"In the present case the by-law was limited in its operation to the members composing the corporation, and is sought to be enforced against one who had voluntarily subscribed to it. In this respect it is distinguished from the case of *People v. Fisher* and from the other cases above cited."

that any mutual agreement among journeymen for the purpose of raising their wages is an indictable offense, or that they are guilty of a conspiracy if, by preconcert and arrangement, they refuse to work unless they receive an advance of wages."

2. The early English statutes regulating the prices of labor, being wholly inapplicable to this country in its colonial condition, were never enforced and form no part of the law of the colony of New York.¹

3. Workmen may agree as a body not to work below certain wages, and there is a distinction between associations which simply agree not to work under certain wages and illegal combinations formed for the purpose of making it compulsory upon journeymen and employers to conform to certain prices, or combinations which agree not to work for any employer who employs journeymen workmen for lower wages. "But it may

¹ "Chief Justice Gibson declared in 1821 that it had never been decided in England that it was unlawful for journeymen to agree that they would not work, except for certain wages, or for master workmen to agree that they would not employ any journeymen except at certain rates. *Commonwealth v. Carlisle*, 1 Hall's Journal of Jurisprudence for 1823, p. 225. And in corroboration of the statement of this very accurate and eminent jurist, I would add that I have examined down to the present time, and have found no case, either in this country or in England, in which any such decision has been rendered. In some of the elementary writers there are passages giving countenance to such a doctrine, and there are some observations of judges to the same effect. Justice Gross said, in *The King v. Mawbey*, 6 Term R. 636, that in many cases an agreement to do a certain thing has been considered the subject of indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves, would not have

been illegal; as in the case of journeymen conspiring to raise their wages, each may insist upon raising his wages if he can, but if several meet for the same purpose, it is illegal, and the parties may be indicted for conspiracy.

"In the case of the *Hartford Carpet Weavers*, tried before the superior court in Connecticut, in 1836, printed at Hartford, 1836, Chief Justice Williams told the jury that if the real nature of the agreement between the defendants was an agreement not to work below certain prices, that that was not an indictable offense nor the subject of a civil action; that it had been so determined in that court, and under this ruling the defendants were acquitted. This case is entitled to great weight. It was the third trial. A great deal of time was given to it, more than seventy witnesses having been examined. It was elaborately argued by counsel, and the ruling of the chief justice was made after the case had been considered upon appeal." *Master Stevedores' Ass'n v. Walsh*, 2 Daly, at p. 7.

be in their power to secure by associated effort what it would not be possible for any one of them to accomplish alone; and that they should have the right to associate together for the mutual protection of their individual interest is so plain that it is singular that it should ever have been questioned." The right of workingmen to associate together for mutual protection of their individual interest is plain.¹

4. It is better for the law to leave employers and employees free to form such associations as they please in relation to rates of compensation so long as the associations are voluntary. These associations will act upon each other; if the employees demand too much or the employers offer too little, such condition cannot continue for long or be productive of any serious inconvenience to the community, as that side must ultimately give way the demands of which are not founded in reason and justice.² Where, however, combinations are formed to intimidate employers or to coerce other employees, it matters little what are the measures adopted, if the object is to inter-

¹In this connection Judge Daly said: "Journeyman may be as well acquainted as their employers with the causes which affect the price of labor, and in this country are generally well informed in such matters. They may be quite as well able to judge whether the ordinary profits of employers justify a reduction or an increase in the rate of wages. Why, then, should they not have the right to come together to consider the condition of the branch of industry in which they are operatives, to impart information to each other, to exchange their views and discuss in a body a matter in which they are so deeply interested? Merchants meet daily upon 'Change that they may be thoroughly informed upon all matters relating to the traffic in which they are engaged; and why should not journeymen meet together to consider and act upon a subject so important to them as the general rate of wages? The exact

sum which should be required for a day's wages may be fluctuating and uncertain, through the operation of other causes than those of demand and supply, such as the instability of the currency, by which the value of the paper representative of a dollar changes as the circulating medium is increased or diminished. These are matters for the consideration of the workmen as well as all other causes affecting the price of their labor; and if they come together, and as a result of their deliberations conclude that a certain rate would be just and reasonable, and that they will not work for less, it would be the height of injustice to call such an act a crime, by declaring that it was, in the language of the statute, unlawfully conspiring to commit an act injurious to trade or commerce, for which each of them may be indicted and punished." *Idem.*

²Citing *R. v. Harris*, 1 Carr. & Marsh. 662.

ferre with the rights of others and to control their free action, such combination is illegal.¹

5. Every man has the right to fix the price of his labor and to work for whom he pleases; every employer has the corresponding right to determine for himself whom he will employ and what wages he will pay. Any attempt at force, threats, intimidation or other coercive means to control a man in the fair and lawful exercise of these rights is an act of oppression, and any combination for such purpose is a conspiracy.

“It may therefore be laid down as the result of this examination, that it is lawful for any number of journeymen or of master workmen to agree, on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices; but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates, unless the journeyman pays the penalty imposed by the combination, or by menaces, threats, intimidations, violence or other unlawful means, is a conspiracy for which the parties entering into it may be indicted.”

¹“It was held under the English statute I have referred to that it did not authorize workmen to combine for the purpose of indicating to a master whom he should employ (Rex v. Bykerdike, 1 M. & Rob. 179); and the several convictions in this country have been in cases where coercive measures were resorted to, either to prevent master workmen from employing journeymen except at certain rates, or to intimidate journeymen from engaging below such rates, or to compel them to become members of the combination.” Idem.

CHAPTER 13.

ILLEGAL COMBINATIONS OF LABOR.

§ 445. Combinations for (A) unlawful and (B) oppressive objects.

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551. The rights of labor.

§ 445. Combinations for (A) unlawful and (B) oppressive objects.—Having followed the development of the law concerning labor combinations as illustrated by certain leading cases, it will facilitate further investigation to group the later decisions under the following heads:

(A) Combinations of labor which are conspiracies because the means or objects are unlawful. Needless to say, if the acts contemplated are of a criminal character, then the combination is a criminal conspiracy.

(B) Combinations of labor which are conspiracies because the means or objects are oppressive. Many combinations of labor, legal in their inception, become illegal by resorting to means and measures highly injurious and oppressive.

§ 446. Scope and effect of decisions affecting labor organizations.—In considering any particular decision affecting labor combinations—and for that matter combinations of capital,—not only the facts in the particular case must be carefully examined, but the nature of the case presented must be constantly borne in mind. Labor organizations come before the courts in the following manner:

(1) As criminal conspiracies—by complaint, indictment or information on behalf of the people.

(2) As civil conspiracies—(a) by action on the case for damages occasioned by the conspiracy; (b) by actions at law, the object of which is to enforce some by-law or provision of the fundamental agreement of the combination.

(3) As either civil or criminal conspiracies,—by proceedings in a court of equity to enjoin the prosecution of the unlawful, oppressive or injurious purposes and acts of the combination.

(1) *As criminal conspiracies.*—In criminal prosecutions, where every intendment is in favor of the accused, the language of

the trial court in charging the jury, or of the appellate tribunal in reviewing the case, may be in its general and sweeping terms more favorable to combinations than the law really warrants. It is not always safe to quote such language in a civil case wherein the legality of a combination is called in question. A given combination may not be a criminal conspiracy and yet may be a civil conspiracy, liable for damages occasioned, and also subject to injunction from a court of equity. It is the habit of both courts and lawyers to quote indiscriminately from both the civil and criminal cases, and the result is a jumble of irreconcilable *dicta*. Every citation of a case involving the legality of a combination should be accompanied by a statement of facts sufficiently comprehensive to make the application of the decision plain, and to indicate whether the case was of a criminal or civil character. If the case be of a criminal character, it is needless to say that much that may be said by the court in favor of combinations by way of extenuation has no application whatsoever in cases of a civil character. A combination that is entirely innocent before the criminal law may be of an exceedingly tyrannical and oppressive nature when judged civilly. The courts when defining the rights of labor in a criminal case frequently use language of a character so sweeping that it has to be materially modified when a combination of the same character and for the same purpose is before the civil tribunal.

(2) *As civil conspiracies.*—It is not often that labor combinations are sued for damages occasioned by their oppressive and injurious acts, for the reason that comparatively few labor organizations are incorporated, and nearly all, whether incorporated or unincorporated, are irresponsible pecuniarily. However, there are a number of such cases, as will be seen further on in this chapter. It is still more seldom that labor organizations appear in civil courts in the endeavor to enforce some of their by-laws, rules or regulations, but there are cases involving the validity of such by-laws, rules and regulations, and incidentally thereto the validity of the entire organization. In both these classes of cases the legality of the combination is made to turn upon facts and considerations which would have little or no bearing in a criminal prosecution. It is therefore important

in considering these cases and applying the general principles announced therein to bear in mind that they are civil as distinguished from criminal cases, and that what the court says in one may have no application whatsoever in the other. In the criminal cases the courts, as already suggested, frequently indulge in sweeping generalizations regarding the rights of labor, which generalizations may cover the rights of labor under criminal law, but which are entirely too broad and comprehensive to accurately describe the rights of labor on the civil side. *Per contra*, the courts on the civil side, in limiting the power of a combination to wilfully and maliciously injure or oppress a third party, frequently have occasion to lay down propositions so restrictive in their nature that, if applied in a criminal case, combinations would be held to be criminal conspiracies when they contained absolutely no criminal element whatsoever.

(3) *Courts of equity*.—Courts of equity are frequently misled by the confusion referred to in the foregoing paragraphs. On the one side the court is misled in the direction of leniency by language taken from decisions in criminal cases which seems to hold broadly that no combination is illegal unless it is criminal. On the other hand courts of equity are misled on the side of severity by propositions taken from civil cases which seem to intimate that all combinations are of a criminal character if they oppress or injure others.

These general considerations are important to bear in mind throughout the discussion of the cases that are about to be reviewed. It is utterly impossible to reconcile the many conflicting propositions that have been laid down by the different courts in connection with labor combinations. It frequently happens, however, that a careful consideration of the facts involved, and whether the case is a criminal or a civil case, help to evolve propositions of some general validity — propositions which tend to reconcile decisions and *dicta* otherwise irreconcilable.

A. CONSPIRACIES OF LABOR TO DO THAT WHICH IS UNLAWFUL.

§ 447. To hinder and delay United States mail.—A combination which contemplates either as one of its objects or as a means to an end the interruption of, or interference with,

United States mail, is a conspiracy, and all parties to such combination are guilty of conspiracy.¹

§ 448. And if employers, who are engaged in a contest with certain of their employees, agree among themselves that, for the purpose of creating public sympathy, or for any other purpose, they will discharge men from their employ for the purpose of stopping the running of mail trains, such combination amounts to a conspiracy.²

¹ United States v. Debs et al. (1894), 63 Fed. R. 436.

² United States v. Debs et al. (1894), 63 Fed. R. 436.

This is a branch of the famous Debs case. It was claimed by the striking employees that the railroad companies conspired together to discharge employees who were willing to operate mail trains, for the sole purpose of obstructing and interrupting the carrying of mail, hoping thereby to enlist the sympathy of the public on behalf of the railway companies. The charge was brought to the attention of Judge Grosscup. At that time the grand jury had under consideration (see United States v. Debs, 63 Fed. R. 436) the whole subject-matter of the strike. Judge Grosscup called them back and gave them a supplemental charge regarding the allegation that the railroad companies themselves were conspiring to obstruct the mails. In the course of this charge the judge said:

"No man is above the law. The line of criminality or innocence is not drawn between classes, but only between men who violate the law and men who do not. The fact that a man may occupy a high position does not exempt him from indictment and trial simply because he does occupy a high position. The fact that a man may occupy a lower position does not exempt him from making known his grievances to you, simply because he may occupy such

a position. Your door, therefore, ought to be open to all inquiry coming from every source that is founded on something more than mere rumor or conjecture; in other words, on something that has tangible form. It is stated in print that some of our fellow-citizens believe that the interruption of the mails and of interstate commerce, into which you are inquiring, was the result of a conspiracy on the part of men higher in the railroads than the employees. If two or more men, no matter what their position in the railroad company may have been, wrongfully and corruptly agreed among themselves, either for the purpose of creating public sympathy in a threatened strike, or for any other purpose, that they would cause the mail trains and trains carrying interstate commerce to be stopped, and did acts in pursuance of that agreement, they are guilty of conspiracy. If two or more men agreed wrongfully and corruptly among themselves that, for the purpose of creating public sympathy in this strike, they would discharge men from their employ who otherwise would not have been discharged, intending that such discharge should stop the running of the mail or interstate-commerce trains, and thereby raise public indignation, they would be guilty of conspiracy. If two or more men, in view of a threatened strike, agreed wrongfully and corruptly that they would not employ men to take the places of

§ 449. A combination the object of which is to induce the employees of railroads carrying the mails to strike, and also to prevent by threats or violence others from taking the places of the striking employees, is a criminal conspiracy.¹

§ 450. A combination of two or more leaders of a labor association to advance their own personal ambition or satisfy their private malice by insisting under effective penalties and threats that the members of the association shall strike, and thereby obstruct either the United States mails or interstate commerce, is a criminal conspiracy.²

the men who had quitted the service, but would allow the trains to stand still, for the sake, merely, of creating public sympathy or indignation against the strikers, they would be guilty of conspiracy, unless the circumstances and situation were such that the employment of new men, reasonably viewed, would lead to danger to those men, or danger to the railroad property, or danger to any public interest. As I said, every man is entitled to bring a complaint of any one of these charges to your attention, if he brings it with tangible evidence,—something that is not mere hearsay or rumor, but something upon which you can place your judgment; and it is the duty of the district attorney to submit it to you and of the members of the grand jury to hear it.”

¹ In re Charge to Grand Jury (1894), 62 Fed. R. 828.

² In re Charge to Grand Jury (1894), 62 Fed. R. 828. In the course of the charge Judge Grosscup said: “The laws of the United States forbid, under penalty, any person from obstructing or retarding the passage of the mail, and make it the duty of the officers to arrest such offenders and bring them before the court. If, therefore, it shall appear to you that any person or persons have wilfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would consti-

tute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, then the fact of an insurrection, within the meaning of the law, has been established; and he who by speech, writing or other inducement assists in setting it on foot, or carrying it along, or gives to it aid or comfort, is guilty of a violation of law. It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids or abets them, no matter what his motives may be, is likewise an insurgent. The penalty for the offense is severe, and, as I have said, is designed to protect the government and its authority against direct attack.” Continuing, the court said: “The mails are in the special keeping of the government and laws of

§ 451. To interfere with interstate commerce.—A combination the object of which is to induce the officers of a railway company engaged in interstate commerce, and subject to the provisions of the interstate commerce act, to refuse to receive

the United States. To insure their unhindered transmission, it is made an offense to knowingly and wilfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same. It is also provided that 'if two or more persons conspire together to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy,' all the parties thereto shall be subject to a penalty. Any person knowingly and wilfully doing any act which contributes, or is calculated to contribute, to obstructing or hindering the mails, or who knowingly or wilfully takes a part in such acts, no matter how trivial, if intentional, is guilty of violating the first of these provisions; and any person who conspires with one or more persons, one of whom subsequently commits the offense, is likewise guilty of an offense against the United States. What constitutes conspiracy to hinder or obstruct the mails will be touched upon in connection with the subject to which I now call your attention. The constitution places the regulation of commerce between the several states, and between the states and foreign nations, within the keeping of the United States government. Anything which is designed to be transported for commercial purposes from one state to another, and is actually in transit, and any passenger who is actually engaged in any such interstate commercial transaction, and any car or carriage actually transporting or engaged in transporting such passenger or thing, are the agencies and subject-matter of interstate com-

merce, and any conspiracy in restraint of such trade or commerce is an offense against the United States. To restrain is to prohibit, limit, confine, or abridge a thing. The restraint may be permanent or temporary. It may be intended to prohibit, limit or abridge for all time, or for a day only. The law draws no distinction in this respect. Commerce of this character is intended to be free, except subject to regulation by law, at all times and for all periods. Temporary restraint is therefore as intolerable as permanent, and practical restraint by actual physical interference as criminal as that which flows from the arrangements of business and organization. Any physical interference, therefore, which has the effect of restraining any passenger, car or thing constituting an element of interstate commerce forms the foundation for this offense. But to complete this offense as also that of conspiracy to obstruct the mails, there must exist, in addition to the overt act and purpose, the element of criminal conspiracy. What is criminal conspiracy? If it shall appear to you that any two or more persons corruptly or wrongfully agreed with each other that the trains carrying the mails and interstate commerce should be forcibly arrested, obstructed and restrained, such would clearly constitute a conspiracy. If it shall appear to you that two or more persons corruptly or wrongfully agreed with each other that the employees of the several railroads carrying the mails and interstate commerce should quit, and that successors should, by threats, intimidation or violence, be prevented from taking

and transport interstate trade from another railway company for the purpose of injuring the latter, is a criminal conspiracy.¹

§ 452. A combination of locomotive engineers the object of which is to attain certain ends by interfering with the transportation of interstate commerce is a conspiracy.²

There was a strike among the locomotive engineers upon the Toledo, A. A. & N. M. Ry. Co.³ In pursuance of the objects

their places, such would constitute a conspiracy."

¹ T., A. A. & N. M. Ry. Co. v. Penn. Co. et al. (1893), 54 Fed. R. 730.

² T., A. A. & N. M. Ry. Co. v. Penn. Co. et al. (1893), 54 Fed. R. 730.

Judge Taft, in passing upon a motion for a temporary injunction in this case, gave the following history of the Association of Locomotive Engineers: "The Brotherhood of Locomotive Engineers is an association organized in 1863, whose members are locomotive engineers in active service in the United States, Mexico and the Dominion of Canada. Their number is thirty-five thousand. The engineers engaged with the defendant companies are most of them members of the brotherhood. The purpose of the brotherhood is declared in its constitution to be 'more effectually to combine the interests of locomotive engineers, to elevate their standing as such, and their character as men.' These ends are sought to be obtained by requiring that every member shall be a man of good moral character, of temperate habits, and a locomotive engineer in actual service with a year's experience, and by imposing the penalty of expulsion upon any member guilty of disgraceful conduct or drunkenness, of neglect of duty or injury to the property of the employer, or of endangering the lives of persons. A mutual insurance association is supported in connection with the brotherhood, in which every member is required to carry a policy, and there is an efficient employment bureau for the members.

A strong and complete organization is maintained for the systematic government of the brotherhood, and its rules are well adapted to establishing and carrying out general and local plans with respect to the terms of employment of its members. Submission to these plans, when once adopted by requisite vote, is required of every member on penalty of expulsion. The management of controversies with employer companies is immediately with a chairman of a standing general adjustment committee for the particular railroad system involved, and afterwards with the grand chief. The grand chief has large judicial and executive powers. He is the ultimate authority always called in to adjust differences between members and their employer, and he is the one to whom appeals are made to settle disputes arising between members and subdivisions. He is also the head of the insurance company."

³ "A 'legal' strike, in brotherhood parlance, means one consented to by the grand chief. His consent is necessary, under the rules of the order, to entitle the men thus out of employment to the three months' pay allowed to striking members. Arthur admits that the particular law to which he referred in this dispatch was one adopted by the brotherhood at Denver three years ago, but which is not published in the printed copy of the constitution and by-laws. It is as follows: 'Twelfth. That hereafter, when an issue has been sustained by the grand chief, and carried into

of the strike certain railway companies were directed by the chief of the locomotive engineers not to ask their engineers to handle freight from the T., A. A. & N. M. Ry. Co. after a certain date. The latter railroad company filed its bill praying that the other railroad companies might be enjoined from refusing to handle interstate-commerce freight delivered to them by the complainant road. The restraining order was granted, and the chief of the association of locomotive engineers was directed to rescind any order which he might have promulgated to members of his association instructing them to refuse to handle complainant's freight. Under the advice of counsel the chief of the engineers obeyed and lifted the so-called "embargo." In passing upon the various questions presented¹ Judge Taft called attention to the sections of the Revised Statutes of the United States requiring common carriers engaged in interstate commerce to handle without discrimination freight offered for transportation,² and proceeded: "All persons combining to carry out rule 12 of the brotherhood against the complainant company, if any one of them does an act in furtherance of the combination, are punishable under the foregoing section. This is true because, as already shown, the object of the conspiracy is to induce, procure and compel the managing officers of the defendant companies to refuse equal facilities to the complainant for the interchange of interstate freight, which, as we have seen, is an offense against the United States. For Arthur to send word to the committee chairmen to direct the men to refuse to handle interstate freight of the complainant, and to notify the managing officers of the defendant companies with the intention of procuring them to do so, all in execution of rule 12, is an act in furtherance of the conspiracy to procure the managing officers of the defendant companies to commit

effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of obligation for a member of the Brotherhood of Locomotive Engineers' Association, who may be employed on a railroad running in connection with or adjacent to said road, to handle the property belonging to said railroad or system in any way that may benefit said company in which the Brother-

hood of Locomotive Engineers is at issue until the grievance or issue of whatever nature or kind has been amicably settled.'"

¹ And upon the effect of rule 12 given in above note.

² See 24 Stats. at Large, 379; 25 Stats. at Large, 855. And also referred to the federal statute defining conspiracies. See sec. 5440, R. S.

a crime, and subjects him and all conspiring with him to the penalties of section 5440, Revised Statutes. Again, for the men, in furtherance of rule 12, either to refuse to handle the freight or to threaten to quit, or actually to quit, in order to procure or induce the officers of the defendant companies to violate the provisions of the interstate commerce law, would constitute acts in furtherance of the conspiracy, and would render them also liable to the penalty of the same section. But it is said that it cannot be unlawful for an employee either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will; but if he give or sell it, or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it or refusal to do so is itself unlawful. Herein is found the difference between the act of the employees of the complainant company in combining to withhold the benefit of their labor from it and the act of the employees of the defendant companies in combining to withhold their labor from them; that is, the difference between the strike and the boycott. The one combination, so far as its character is shown in the evidence, was lawful, because it was for the lawful purpose of selling the labor of those engaged in it for the highest price obtainable and on the best terms. The probable inconvenience or loss which its employees might impose on the complainant company by withholding their labor would, under ordinary circumstances, be a legitimate means available to them for inducing a compliance with their demands. But the employees of defendant companies are not dissatisfied with the terms of their employment. So far as appears those terms work a mutual benefit to employer and employed. What the employees threaten

to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure and compel the companies and their managing officers to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give a man the right to labor or withhold his labor for such a purpose."

The judge continued: "We have thus considered with some care the criminal character of rule 12 and its enforcement, not only because, as will presently be seen, it assists in determining the civil liabilities which grow out of them, but also because we wish to make plain, if we can, to the intelligent and generally law-abiding men who compose the Brotherhood of Locomotive Engineers, as well as to their usually conservative chief officer, what we cannot believe they appreciate, that, notwithstanding their perfect organization, and their charitable, temperance, and other elevating and most useful purposes, the existence and enforcement of rule 12, under their organic law, make the whole brotherhood a criminal conspiracy against the laws of their country."¹

¹ Regarding the civil injury to the T., A. A. & N. M. Ry. Co. Judge Taft said: "We now come to the character of rule 12 and its enforcement as a civil wrong to complainant. Lord Justice Fry said, in the case of *Steamship Co. v. McGregor*, 23 Q. B. D. 598, 624: 'I cannot doubt that whenever persons enter into an indictable conspiracy, and that agreement is carried into effect by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators.' See also *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. R. 825; *Steamship Co. v. McKenna*, 30 Fed. R. 48; *Carew v. Rutherford*, 106 Mass. 1, and *Moore v. Bricklayers' Union*, 23 Wkly. Law Bul. 48. Under the principle above stated, Arthur and all the members of the brotherhood engaged in causing loss to the complainant are liable for any actual loss

inflicted in pursuance of their conspiracy. The gist of any such action must be not in the combination or conspiracy, but in the actual loss occasioned thereby. No civil liability arises simply because of the rule 12, or its attempted enforcement, unless injury is done. Ordinarily the only difference between the civil liability for acts in pursuance of a conspiracy and for acts of the same character done by a single person is in the greater probability that such acts when done by many in a combination will cause injury. If a single engineer of one of the defendant companies, acting alone, and with intent to injure the complainant, should cause the complainant loss by refusing to handle its interstate freight, complainant could maintain a right of action against him for damages. The refusal on his part would be a wrongful and illegal act under the interstate commerce law, and, as said by Lord Justice Brett in

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§ 453. A combination of railway employees to injure the Pullman company by compelling, by threats of a strike and by actually striking, the several railway companies to cease using the Pullman cars, and thereby inflicting on the companies great injury, is a conspiracy at common law;¹ and a combination to incite railway employees generally throughout the country to strike, where there is no dissatisfaction on the part of the em-

Bowen v. Hall, 6 Q. B. D. 333, 337: 'Whenever a man does an act which in law and in fact is an unlawful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which, in the particular case, does produce such an injury, an action on the case will lie.' And so, if a single engineer, with intent to injure complainant, could, by threatening to quit, or by actually quitting, for the purpose, procure or induce the defendant company, in whose employ he is, to inflict a loss upon complainant by unlawfully refusing to interchange interstate freight, complainant could hold him civilly liable for the loss. By section 8 of the interstate commerce law the complainant is expressly given a cause of action in damages against any connecting common carrier company for such a loss, and it is clear upon the authorities that any one intentionally procuring the connecting company to inflict such loss would be equally liable. Thus, in Walker v. Cronin, 107 Mass. 555, the supreme judicial court of that state sustained an action for damages by the plaintiff, who was a shoe manufacturer, against the defendant, for inducing plaintiff's employees to break their contracts of service with him to his injury. In Lumley v. Gye, 2 El. & Bl. 216, it was held that the plaintiff could recover damages from the defendant for procuring a third person, with whom the plaintiff had made a contract, to break the contract, when

such procuring was with the intention of injuring the plaintiff. The same principle was announced in Bowen v. Hall, 6 Q. B. D. 333, 337, and has since been followed in other cases, and the doctrine has been applied even where there was not a binding contract, but only the probability that one, though not binding, would be performed. See Rice v. Manley, 66 N. Y. 82, and Benton v. Pratt, 2 Wend. 385. If a person, with rights secured by a contract, may, in case of loss, recover damages from one not a party to the contract, who, with intent to injure him, induces a breach of it, *a fortiori* can one whose rights are secured by statute recover damages from a person who, with intent to injure him, procures the violation of those rights by another and causes loss. The difficulty in supposing or stating any civil liability when the acts we have been discussing were done by a single engineer is in the improbability that either by singly refusing to handle the freight he could cause any injury to complainant, or by singly threatening to quit, or by quitting he could procure his company to do so. But when we suppose that all, or nearly all, the engineers on the eight different companies combine with their chief to do these unlawful acts for the purpose of injuring complainant, the intended loss becomes not only probable, but inevitable."

¹ Thomas v. Cin., N. O. & T. P. Ry. Co., 62 Fed. R. 803.

ployees with the terms of their employment, thus paralyzing railway traffic, the ultimate object of the combination being to compel the Pullman Palace Car Company to pay its employees higher wages,— such a combination is a conspiracy.¹ And such a combination, its object being to obstruct interstate commerce, is a conspiracy within the act of July 2, 1890. And where such combination intends to stop mail trains and does as a matter of fact delay many trains in violation of the statute,² it is a conspiracy, although the interference with the mails is effected by the employees merely quitting their employment.³

¹ Thomas v. Cin., N. O. & T. P. Ry. Co., *supra*.

² R. S., sec. 3995.

³ Thomas v. Cin., N. O. & T. P. Ry. Co., 62 Fed. R. 803.

This case grew out of the famous American Railway Union strike of 1894. The history of the union and of the beginning of the strike are detailed in the report of the union as follows: "The American Railway Union is an organization of railway employees, to which are eligible as members all persons in the service of railways below a certain rank. It was organized in June, 1893. On May 11, 1894, at Pullman, Ill., the employees of the Pullman Palace Car Company, engaged in manufacturing railway cars of all kinds, including sleeping cars, left the company's employ because of its refusal to restore wages which had been reduced during the preceding year, and the works were then closed. On June 11, 1894, the general convention of the American Railway Union met at Chicago, and decided that the American Railway Union would take measures to compel the Pullman company to resume business and to re-employ its employees who left its service on terms to be fixed by arbitration. It does not appear that at this time the Pullman company's employees were members of the railway union, or eligible as such. At the June convention of 1894 there were present representa-

tives from four hundred and fifty lodges of the union, and the number of members, as estimated at that time, was two hundred and fifty thousand. It is said that the local unions had voted for the Pullman boycott before the convention met."

The plan of the boycott, as shown by the evidence, was this: Pullman cars are used on a large majority of the railways of the country. The members of the American Railway Union whose duty it was to handle Pullman cars on such railways were to refuse to do so, with the hope that the railway companies, fearing a strike, would decline to haul them in their trains, and inflict a great pecuniary injury upon the Pullman company. In case the railway companies failed to yield to the demand, every effort was to be made to tie up and cripple the doing of any business whatever by them, and particular attention was to be directed to the freight traffic, which it was known was their chief source of revenue. As the lodges of the American Railway Union extended from the Allegheny mountains to the Pacific coast, it will be seen that it was contemplated by those engaged in carrying out this plan, that, in case of a refusal of the railway companies to join the union in its attack upon the Pullman company, there should be a paralysis of all railway traffic of every kind throughout that vast ter-

Both employers and employees, except where contracts are in force covering a specified period, have the right to terminate their relationship at will, but employees have no right to combine together to strike in order to compel their employer

ritory traversed by lines using Pullman cars. It was to be accomplished not only by the then members of the union, but also by procuring, through persuasion and appeal, all employees not members either to join the union or to strike without joining, by guaranteeing that, if they would strike, the union would not allow one of its members to return to work until they also were restored.

And further on the court continues (pp. 817, 818): "Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy at common law? If it was, then injury inflicted would be without legal justification, and malicious. A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542. What were the purposes of this combination of Debs, Phelan, and the American Railway Union board of directors? They proposed to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and, on the refusal of the railway companies to yield to compulsion, to inflict pecuniary injury on the railway companies by inciting their employees to quit their service and thus paralyze their business. It could not have been unknown to the combiners that the Pullman cars were operated by the railway companies under contracts with Pull-

man. Such large transactions are never conducted without contracts saving the rights of both sides, and the combiners had every reason to believe that it would be a violation of those contracts for the companies to refuse further to haul Pullman cars in their trains. One purpose of the combination was to compel railway companies to injure Pullman by breaking their contracts with him. The receiver of this court is under contract to Pullman, which he would have to break were he to yield to the demand of Phelan and his associates. The breach of a contract is unlawful. A combination with that as its purpose is unlawful, and is a conspiracy. *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240. But the combination was unlawful without respect to the contract feature. It was a boycott. The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to com-

to withdraw from a mutually profitable relation with a third person for the sole purpose of injuring that third person, when the relation thus threatened has no effect whatsoever on the character or reward of their services.¹

§ 454. It is the motive for striking and the object sought to be obtained thereby that make the injury unlawful and the combination a conspiracy.² Referring to the character of the combination in question the court said: "But the illegal character of this combination with Debs at the head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are the arteries in the human body, and yet Debs and Phelan and their associates proposed, by inciting the employees of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employees. The merits of the controversy between Pullman and his employees have no bearing what-

bine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful, and the combination by which it is effected an unlawful conspiracy. The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment and a boycott is not a fanciful one, or one which needs the power of fine distinction to determine which is which.

Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England."

¹ To the same effect, see *Moore v. Bricklayers' Union*, 23 Wkly. Cin. Law Bull. 48, which was affirmed by the supreme court of Ohio without an opinion.

² *Thomas v. Cin., N. O. & T. P. Ry. Co.*, 62 Fed. R. 803.

ever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise."¹

§ 455. A combination by railroad employees to prevent railroads engaged in carrying mail and interstate commerce from carrying freight and passengers and hauling cars, and also from securing the services of persons to take the place of strikers, is a conspiracy within the act of July 2, 1890.²

¹ "More than this, the combination is in the teeth of the act of July 2, 1890, which provides that: 'Section 1. Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.' That such a combination as the one under discussion is within the statute just quoted has been decided by Judge Billings of Louisiana in *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. R. 994. His view has been followed by the circuit judges of this circuit within the past ten days, by Judges Woods, Allen and Grosscup of the seventh circuit, and by Judge Woolson of the eighth circuit. A different view has been taken by Judge Putnam in *United States v. Patterson*, 55 Fed. R. 605, but, after consideration, Judge Lur-

ton and I cannot concur with the reasoning of that learned judge. The fact that it was the purpose of Debs, Phelan and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore their combination was for an unlawful purpose, and is a conspiracy, within the statute cited. It could also be shown, if it were necessary, that this combination was an unlawful conspiracy because its members intended to stop all mail trains as well as other trains, and did delay and retard many, in violation of section 3995, Revised Statutes of the United States, which imposes a penalty on any one wilfully and knowingly obstructing or retarding the passage of the mail. It would be no defense, under that statute, that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment."

² *United States v. Elliott et al.* (1894), 64 Fed. R. 27. This was a bill for injunction filed by the United States district attorney under direction of the attorney-general of the United States to enjoin the defend-

§ 456. Associations or combinations which in their origin and purposes were innocent and lawful may degenerate into

ants from the consummation of an organized conspiracy which threatened to obstruct and was impeding the passage of the United States mails and interfering with interstate commerce. The case came before the court on a demurrer, which was overruled.

In passing upon the allegations of the bill and the applicability of the law of 1890, Judge Phillips said:

"It would present a most anomalous state of affairs, in a country like this, if men, because of some supposed or real grievance with an employer in a distinct business, should be permitted to confederate and conspire together for the purpose of coercing the employer into acceding to their demands, and, as a means to a specific end, tie up and stop independent railroads extending from the Pacific coast to the Lakes on the north and northeast, deaden all the engines on the tracks; thereby intercepting the transportation of passengers and the necessary supplies passing from one state to another, and stop the shipment of cattle, sheep, hogs, corn, wheat, oats, fruits and vegetables. It is impossible to state in language the far-reaching destructiveness and ruin of such a scheme, if permitted to proceed to accomplishment. The business of this country has adjusted itself to operations of interstate commerce. Large communities of people are dependent for the necessities of life upon the agricultural products of other communities. While we have a state here with a productive energy and capacity for producing nearly all the necessities of life, yet, because of the fact that other localities can produce with less labor and more profit certain supplies than the local community, people forbear giv-

ing attention to the production of articles which they can thus obtain more cheaply and readily, and depend therefor upon other communities, and the railroads for transporting such supplies from one state to another. If persons may combine and confederate together to stop the railroad trains from passing from one city and one state to another, it is easy to be seen how quickly and readily they could produce ruin, famine and death in our great cities. They could cut off such necessities for the sustenance of life as an adequate supply of coal, and in one month, or less, produce a coal famine in city and country. It certainly ought to be permissible to the government, representing the whole people, to interpose to preserve and protect the public life and the public health. The framers of the federal constitution builded wisely when they gave to congress control over our interstate commerce. With prophetic eye they looked far into the future of their country, and foresaw the development of its commerce, and the absolute necessity of the freedom of commercial intercourse between the different communities extending from ocean to ocean. The fact that congress did not enact the statute above recited until 1890 is no argument against the existence of its power. Many powers lodged by the constitution in the legislative department long lie dormant until the exigency arises to invoke them into activity. As said by Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 620: 'When we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adopting legal principles to the new

conspiracies, and after they become conspiracies they cannot set up their lawful origin and objects by way of defense.¹

§ 457. Owing to a disagreement between the warehousemen and their employees, and a like disagreement between the principal draymen and their subordinates, in the city of New Orleans, it was threatened that, unless there was an acquiescence in the demands of the subordinate workmen and draymen, all the men in all of the defendant organizations would leave work and would allow no work in any department of business; violence was threatened and used in support of this demand; the controversy affected both interstate and foreign commerce. On a bill for an injunction it was decided that the combination came within the federal act of 1890 and the injunction issued.²

§ 458. Contempt of court — Interfering with the court's receiver — Federal act of 1890.— Employees of a railroad company that is in the hands of a receiver appointed by a

and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.' ”

¹United States v. Workingmen's Amalgamated Council, 54 Fed. R. 994.

²In its opinion the court said: “A difference had sprung up between the warehousemen and their employees and the principal draymen and their subordinates. With the view and purpose to compel an acquiescence on the part of the employers in the demands of the employed, it was finally brought about by the employed that all the union men — that is, all the members of the various labor associations — were made by their officers, clothed with authority under the various charters, to discontinue business, and one of these kinds of business was transporting goods which were being conveyed from state to state and to and from foreign countries. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimi-

dation springing from vast throngs of the union men assembling in the streets, and in some instances by violence; so that the result was that, by the intended effects of the doings of these defendants, not a bale of goods constituting the commerce of the country could be moved. The question simply is, Do these facts establish a case within the statute? It seems to me this question is tantamount to the question could there be a case under the statute? It is conceded that the labor organizations were at the outset lawful. But when lawful forces are put into unlawful channels, *i. e.*, when lawful associations adopt and further unlawful purposes and do unlawful acts, the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country.”

federal court may abandon the employment if they are dissatisfied with the wages, or with the hours of work, or with the conditions of employment generally, and they may by persuasion and argument induce other employees to do the same thing; but if they combine together and resort to threats or violence to induce others to leave the employment of a receiver, or overawe the others by preconcerted demonstrations and force, and thereby prevent the receiver from operating the road, the combination is a conspiracy to do an unlawful act, and they are guilty of contempt of court.¹ And in this connection, where two or more combine together to do an unlawful act, and in the prosecution of that unlawful intent one of the combination goes a step beyond the balance of the party and does acts which the others themselves do not do, all are responsible for the action of the one. To make them responsible, however, it is essential that there should be a combination to do some unlawful act.²

Where there is no combination, no agreement, no preconcert of action, then each individual is responsible simply for what he himself does, and though large numbers should act as if animated by one mind and one purpose, still each is responsible only for what he does, unless there is an agreement to act in concert.³

¹United States v. Kane et al., 23 Fed. R. 748.

²United States v. Kane et al., *supra*. The decision in this contempt case was by Brewer, J., in the circuit court, and the following general principles were laid down: Before the court can be asked to treat parties to such a combination as in contempt, it must clearly appear that the pressure brought to bear upon employees working for the receiver was something more than mere requests for them to leave the employment; it must appear "that whatever language may have been used, it was used under such circumstances and with such demonstrations that the employees, the engineers, and the trainmen felt that, as prudent men, they must leave; that, because of due regard for their own safety and

their own well-being, they had to leave; and also that demonstration was made under the circumstances with the intent to accomplish that result. If that is shown, if the testimony makes it clear that these parties went in such numbers, and conducted themselves in such a way, that while they simply said, 'Please get off this engine,' or 'We want you to get off this engine,' they intended to overawe,—intended, by the demonstrations which they made, to impress upon the minds of the engineers and trainmen that personal prudence compelled them to leave, then a case of contempt is made up; it is not necessary that there should be actual violence." United States v. Kane et al., 23 Fed. R. 748; *In re Doolittle*, 23 Fed. R. 544.

³United States v. Kane et al., 23 Fed.

§ 459. Court will hear and adjust complaints.—The court is always open to hear and adjust the complaints of parties in the employ of the court's receiver. When the court has taken possession of a railway property and is operating it through

R. 748. Justice Brewer said: "If there is no such agreement, no such preconcert of action, why then each individual is responsible simply for what he does. Thus, for instance, if there should happen to gather here on the street fifty or one hundred or two hundred men, with no preconcert of purpose, accidentally meeting here, and a street fight should develop in their midst, all that crowd are not responsible for it; that would be unjust; that would be unfair; because they did not go there, they did not meet together, with a preconcerted purpose to do anything unlawful; and although something unlawful may be done in that crowd, yet only they are at fault who do the unlawful thing. But if they all met, as I said, for the purpose of doing some unlawful act, having formed beforehand the purpose to do it, and are present there to carry that purpose into effect, then every man, by virtue of uniting in that preconceived purpose to do the unlawful thing, makes himself responsible for what any one does. A familiar illustration which often comes before a court is this: Supposing three or four men form a purpose to commit burglary, and break into a house for the purpose of committing that burglary, that is all they had intended to do; that is the unlawful act, and the single unlawful act, which they had set out to accomplish; they get into the house and somebody wakes up, and one of the party shoots and kills. Now the three or four persons who went into that house never formed beforehand the intent to kill anybody; they simply went in there to commit burglary; but, combining to

do that unlawful thing, in the prosecution of that burglary, and to make it successful, one of the party shoots and kills, and the law comes in and says: 'All of you are guilty of murder; we do not discriminate between you; you broke into that house to commit burglary; in the prosecution of that burglarious entrance one of your party committed murder; all are guilty.' Now that is a reasonable rule when you stop to think of it; it is not a mere harsh, arbitrary, technical rule which the courts have laid down and the statutes have established; it is a rule intended to prevent combinations or conspiracies to do an unlawful thing, and where there are many together it is often difficult to distinguish the one who does any particular act. I have a very forcible illustration right in this testimony before me. Mr. Tyler is charged by one or two witnesses with having said, in one of those interviews with one of the engineers, after some colloquy, and a man saying he was not afraid to take that engine and train out, 'What about the afterclap?' Now Mr. Orr comes forward and says, and Mr. Tyler too, that Mr. Tyler did not use that expression. Mr. Orr said he heard the remark, but it was a remark from some one at his right, and was not made by Mr. Tyler. That will often be true where there are many together; in the excitement which attends such a gathering, it is often very difficult to individualize the particular actor or speaker, and while one witness may say this man did it or this man said it, another witness equally credible, and present at the time, may have it in his mind that

its receiver, any man connected with the administration or management of the road, however humble his employment, has the same right that the receiver himself has, or that any creditor of the road has, to come into court and insist that any grievance which he has against the management of the road shall be considered and passed upon.¹

While it is true that ordinarily a corporation operating its own property has entire liberty to employ whom it pleases and dismiss whom it pleases, it is otherwise when a court takes possession of that property and appoints a receiver to operate it; the liberty to employ and dismiss is somewhat abridged, the receiver has not the arbitrary power originally possessed by the corporation, but each one in the receiver's employ has the right to come into court and complain of any unreasonable requirements, regulations or conditions established by the receiver, and the court is bound to listen to the complaint and see that justice is done between the receiver and any employee.²

another man did or said it. So, because it is often in the nature of things difficult to individualize a man that does or says a particular matter, the rule is laid down that if they have met with a preconceived purpose to do an unlawful act, all must respond for what one does and says. That is, as I said, no harsh and arbitrary rule, but a rule in the interests of justice, for the protection of society."

¹United States v. Kane et al., 23 Fed. R. 748.

²United States v. Kane et al., 23 Fed. R. 748. The court goes on to say: "But this party of strikers, not coming into this court, assumed at at that time to try to stop the operation of the road; tried to prevent the engineers from running out the trains; tried to prevent the trainmen from working; and while, as I say, they touched no property to injure it, yet I think there was no one that heard the testimony but felt that that demonstration was made with the intent to overawe those engineers; to make them feel that it was

not personally prudent to run those trains; that there was a risk to themselves in attempting to continue the operations of the road there; and that these engineers acted under a reasonable sense of personal danger accruing from the demonstration that was made in their presence. I have no doubt that some men, who are excessively bold, might have laughed at it and waited, believing that no personal violence would be used; but men are not all equally bold and courageous; the average man has a feeling that it is his duty to regard his personal safety; we all know that, and we act upon that presumption; and when these men met there in that fever of excitement, when the crowd surged backwards and forwards, from one end of that yard to the other, approaching now this engine and now that, they knew, and every man knows, that that kind of a demonstration was calculated to intimidate; and they knew, and every man knows, that ordinarily prudent men are not going to risk their personal safety when there is

A court of equity engaged in the administration of a railway will adjust differences between the receiver and his employees, and it is within the power of the court in the interest of the property to direct the receiver to enter into a reasonable and suitable contract with any particular class or body of his employees, and in this connection he may deal with a union of his employees regarding schedules of rates and regulations; but whatever schedule is adopted must apply not only to employees who may be members of the union, but to all employees without discrimination or disqualification in the same grade of employment, whether they are members or non-members of the union.¹

nothing to be gained by it. They are going to say: 'Well, here is a crowd; they are in excitement here; they pass backwards and forwards through this yard; and though they say we cannot do any violence, we cannot order you to leave, but you had better leave; we request you to leave; you are not going back on us, and we had better quit.' Every one understands that these men felt overawed, intimidated, and quit work, not because they wanted to,—some of them, at least,—but because they felt that their personal safety, personal prudence, required them to do it. It would be, as it seems to me, blinding my eyes to obvious facts to say that there was not intimidation. I think these men that were there would themselves feel that I did not respect their good sense, that I did not give them credit for ordinary intelligence, if I should say that that was a mere peaceable gathering of a few men to present a request; and I have come reluctantly to the conclusion that there was an effort, a preconcerted effort, at that time, by a demonstration of force, to overawe these engineers and trainmen, and to prevent the receiver from operating the road."

¹ *Waterhouse et al. v. Comer* (1893), 55 Fed. R. 149. Judge Speer, in rec-

ognizing to a certain extent the Brotherhood of Locomotive Engineers, and in authorizing the receiver to treat with such brotherhood regarding a scale of wages, etc., expressly held that the rule 12 of the brotherhood was in direct and positive violation of the laws of the land, and no court, state or federal, would hesitate for a moment so to declare it. After referring to the interstate commerce law, the Sherman act of 1890, the judge proceeded: "Now it is true that in any conceivable strike upon the transportation lines of this country, whether main lines or branch roads, there will be interference with and restraint of interstate or foreign commerce. This will be true also of strikes upon telegraphic lines, for the exchange of telegraphic messages between people of different states in interstate commerce. In the presence of these statutes, which we have recited, and in view of the intimate interchange of commodities between people of several states of the Union, it will be practically impossible hereafter for a body of men to combine to hinder and delay the work of the transportation company without becoming amenable to the provisions of these statutes. And a combination or agreement of railroad officials or

§ 460. Referring to the unpleasant responsibility resting upon the court in contempt cases arising out of labor troubles; Justice Brewer said: "Courts are organized for the protection of persons and property, and while, in the discharge of their duties, oftentimes there are unpleasant burdens cast upon them, yet no man is fit to occupy a position as a judge, especially in a court which, like this, has such vast powers and such solemn responsibilities, who can hesitate, whenever a wrong is brought to his attention, to treat it as a wrong and punish accordingly."

It is the duty of the court to see that the property under its control or in the hands of its receivers is absolutely protected, and that nobody, directly or indirectly, interferes with the management of that property; and while no man is bound to remain in the employment of the court's receiver, no man will be permitted to interfere with either the property or the administration of the property while it is in the hands of the court.¹

§ 461. Where the employees of a railroad company which is not in the hands of the court combine to strike, and in pursu-

other representative of capital, with the same effect, will be equally under the ban of the penal statutes. It follows, therefore, that a strike, or 'boycott,' as it is popularly called, if it was ever effective, can be so no longer. Organized labor, when injustice has been done or threatened to its membership, will find its useful and valuable mission in presenting to the courts of the country a strong and resolute protest and a petition for redress against unlawful trusts and combinations which would do unlawful wrong to it. Its membership need not doubt that their counsel will be heard, nor that speedy and exact justice will be administered wherever the courts have jurisdiction. It will follow, therefore, that in all such controversies it will be competent, as we have done in this case, for the courts to preserve the rights of the operatives, to spare them hardship, and at the same time to spare to the public the unmerited hardship which it has suffered by such conflicts in the past. It will be

also found that by such methods organized labor will be spared much of the antagonism it now encounters, and in its appeal to the courts it will have the sympathy of thousands, where, in its strikes, it has their opposition and resentment."

¹ United States v. Kane et al., 23 Fed. R. 748. In conclusion Justice Brewer said: "If there is any subsequent demonstration of a similar nature, I want now to say most kindly, but most emphatically, so that nobody may misunderstand, that any parties who are engaged in it and who are brought before me for contempt must expect the severest penalty which the law permits. If there is any man, as I said awhile ago, who feels that he is wronged in any way by the receivers appointed by this court, all he has to do is to come and make his grievances known, and they will be heard, and the court will try to do justice by him as well as by the receivers; but no violence in any way, shape or manner will be tolerated in the slightest degree."

ance of the purpose of their combination take possession of and obstruct the movement of cars and engines of such company, and at the same time, in the contest with their own company, obstruct the operation of engines and cars of a company which is in the hands of the court, and which engine and cars are being operated by receivers of the court, such acts are contempt of court.¹

¹In *re Doolittle*, 23 Fed. R. 544. This case was heard before Brewer and Treat, JJ. Judge Brewer in his opinion said: "It does not appear that these defendants in the first instance started out to obstruct the receivers in their management of the road. In some way they had ascertained that the road was in possession of the receivers appointed by this court, and that it was not prudent to interfere with them. But it is clear that, while engaged in a strike against the Missouri Pacific Railroad, they did interfere with the management of the engine and freight cars under the control of such receivers, and did obstruct such receivers in carrying on the business of the road placed in their charge by this court. Now, while in one sense they cannot be charged with contempt in that they intended to obstruct this court and its officers in the discharge of its and their duty, yet they placed themselves in this attitude: They engaged in an unlawful enterprise, and while so engaged they did interfere with the officers of this court in the management of the road which was in their hands as receivers. Now, if a party engaged in a lawful undertaking unintentionally interferes with some of the officers of this court, and obstructs them in the discharge of their duties, this court is not tenacious of any mere prerogative, and would let such action pass almost without notice, but where parties are engaged in that which is of itself unlawful, in doing that which they have no right to do,

and in so doing obstruct the officers of this court, although intending no contempt, that is a very different thing. Suppose a party of men — and I state this merely as an illustration — combine to commit an assault and battery upon one person, and, without intending so to injure, do, through mistake, actually seize and beat a third person. Although such beating was unintentional, perhaps accidental, yet, as they were engaged in an unlawful enterprise, it is just the same as though they intended that unlawful attack upon the person actually receiving the injury. And so, here, though these defendants did not set out to obstruct the officers of this court, and the receivers of the Wabash Company, in their administration of that property, yet they did set out to obstruct some persons in the exercise of their legal rights; they did set out to do that which they had no right to do; and this court is justified, indeed, it is its duty, inasmuch as they did obstruct the officers of this court, to regard it just the same, or nearly the same, as though they started out to obstruct the officers of this court, the receivers of the Wabash Railway Company.

"Mr. Charles C. Allen: Do I understand your honor to say that the act of striking — merely carrying out the strike — was unlawful?

"The court (Judge Brewer): It is not the mere stopping of work themselves, but it is preventing the owners of the road from managing their own engines and running their own

Parties to an unlawful combination, the object of which is to prevent the operation of a road in the hands of a receiver and thereby injure its business and maliciously incite the employees of the receiver to strike, are guilty of contempt of court.¹ Parties who know that a railroad is in the hands of a court, and who with that knowledge attempt to interfere with

cars. That is where the wrong comes in. Anybody has a right to quit work, but in interfering with other persons working, and preventing the owners of railroad trains from managing those trains as they see fit—there is where the wrong comes in.”

Judge Treat in his opinion said: “If there was any just ground of complaint, so far as the so-called strikers were concerned, this tribunal was open to have them present their matters here, and the court would have instructed the receivers with regard to it; and one of the prominent reasons why courts are so prompt to punish men who interfere with receivers in the custody and control of the property committed to them by law is the fact that any one engaged in employment under them can have ample redress by applying to the court with respect thereto. Now, instead of coming to this court to make application, as some other parties have done—other employees,—they choose to engage in a lawless enterprise whereby were involved, not only the stoppage of commerce, but perhaps a loss of millions of dollars, and merchants and private individuals and all classes were injured by this lawless proceeding. And now the party comes and says, what? Evasively, ‘I did not know that I was interfering with the officers of this court;’ but he did know that he was interfering with property that he had no right to interfere with, and ‘perchance he overstepped the limit, and involved himself wit’in the jurisdiction of

this court.’ Further, ‘We did not directly by physical force do sundry and divers things; we merely requested other persons to do it.’ A specious pretense! The court must be supposed to know, as everybody else does, what the object was; it was the threatening intimidation which lay behind the whole matter, and hence they are within the rule. ‘A request,’ under such circumstances, was a threat. The court cannot be blinded by such mere specious language. The fact is there—the positive fact that here was a direct threat and an intimidation. The form of language amounts to nothing. Courts do not stick to the letter; they look at the fact—the act itself,—and that was the case here. Parties determined lawlessly to stop the commerce of the country, so far as these roads were concerned, and to do it by force, by threats, and by intimidation; and in doing it they interfered with the property of this company under the charge of the court, and, instead of coming to this court, if they had any wrong to be redressed, and asking the court to adjust their cause, they took the law into their own hands, and they must suffer the consequences of doing it. Of course I assent, as I must do, to the lenient punishment prescribed by the circuit judge; but if it had been left to me alone, it would have been much severer.”

There is an interesting note to this case by Mr. Francis Wharton.

¹ Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. R. 803.

the receiver in the operation of the road, are guilty of contempt of court.¹

§ 462. Receiver's employees may organize unions.—Employees of a receiver have a right to organize labor unions and to join labor unions for the purpose of bettering their condition and securing more favorable terms of employment, and such associations, unions and combinations are entirely lawful until either as a means or an end they do that which is unlawful, injurious or oppressive.² In this connection Judge Taft said: "Now, it may be conceded in the outset that the employees of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory."

Regarding the right of free speech Judge Taft said: "Something has been said about the right of assembly and free speech secured by the constitution of Ohio. It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution or suits for slander, or for any of the many malicious

¹ Thomas v. Cincinnati, N. O. & T. P. Ry. Co., *supra*.

² Thomas v. Cincinnati, N. O. & T. P. Ry. Co., *supra*.

and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue rather than his hand."

§ 463. Any unlawful interference with the operation of a road in the hands of a receiver is a contempt of court, it being in the nature of a direct resistance to the mandates of the court.¹ Receivers are officers of the court, and by their agents and employees are *pro hac vice* officers of the court. As such officers they are responsible to the court for their conduct; and if they wilfully or maliciously injure the property in the hands of the court, or seek to embarrass the receivers in the performance of their duties, they are guilty of contempt.²

"Labor organizations are lawful and generally laudable associations, but they have no legal status or authority, and stand before men and the law on no better footing than other social organizations, and it is preposterous that they should attempt to issue orders that free men are bound to obey; and no man can stand in a court of justice and shelter himself behind any such organization from the consequences of his own unlawful acts."³ If, however, any employee of a receiver is improperly

¹ *Secor v. Railroad Co.*, 7 Biss. 518, Fed. Cas. No. 12,605; *United States v. Kane et al.*, 23 Fed. R. 544; *In re Higgins*, 27 Fed. R. 443.

² *In re Higgins et al.*, 27 Fed. R. 443. In this case Judge Pardee said: "It is well-settled law that whoever interferes with property in the possession of a court is guilty of contempt of that court, and I regard it as equally well settled that whoever unlawfully interferes with officers and agents of the court, in the full and complete possession and management of property in the custody of the court, is guilty of a contempt of court; and it is immaterial whether this unlawful interference comes in the way of actual violence or by intimidation and threats. The employees of the receivers, although *pro hac vice* officers of the court,

may quit their employment, as can employees of private parties or corporations, provided they do not thereby intentionally disable the property; but they must quit peaceably and decently. Where they combine and conspire to quit with or without notice, with the object and intent of crippling the property or its operation, I have no doubt that they thereby commit a contempt; and all those who combine and conspire with employees to thus quit, or as officials of labor organizations issue printed orders to quit or to strike, with an intent to embarrass the court in administering the property, render themselves liable for contempt of court."

³ From the opinion of the court, *In re Higgins*, *supra*.

discharged by a receiver or any of the receiver's agents, the court is open to hear his complaint and see that justice is done.

Where the property of a railway company is in the hands of the court's receiver the party is guilty of contempt of court who as chairman of a combination sends to various foremen working for the receiver the following notice:

"OFFICE OF LOCAL COMMITTEE, June 17, 1885.

"—— —, Foreman: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employees. But in no case are you to consider this an intimidation."¹

¹In *re Wabash R. Co.*, 24 Fed. R. 217. In holding defendants guilty of contempt of court Judge Krekel said: "It will be recollected that the property of the Wabash Railroad is in the hands of the court, and that receivers have been appointed by it for its management. The owners have been deprived of possession and control, and with it the ability to protect it. The court, through its officers, has undertaken to do the ordinary business of the company, the running of regular, speedy and safe trains for the conveyance of mails, passengers and merchandise; and, moreover, the management of the property so as to make it valuable to those who have claims against it. All these great public and private interests demand that no unnecessary interferences with the property and its management should take place. If any one has grievances, be they employees or others, they can have easy and ready redress for their actual or supposed wrongs by bringing them to the attention of the court. Both receivers and managers are subject to its control. The court will not permit its officers to wrong any one, and is always ready to redress grievances. Such a thing as taking the law into their own hands, be they employees of the company or officers of the

court, will not be tolerated. Stress has been laid in the argument for defendants upon the promise made in the circular issued by the managers during the early strike, that notice should be given to the chairman of the committee of the employees of any intended reduction, and that the committee should be consulted about any reduction or suspension. These promises, heretofore more fully set out, though not applicable here, were well calculated to mislead, and no doubt had their influence in the proceedings afterwards had by the committee and strikers. The wholesome law of the state of Missouri, requiring companies to give thirty days' notice to employees before reducing their wages, which went into effect on the 23d day of June, has no application, because not in force when these occurrences took place. The provisions of this law no doubt emanated from the same sense of justice which induced the promise of the managers to give notice of any reduction, in the circular spoken of. It moreover indicates the true source where the remedy for grievances of the kind under consideration is to be sought. Differences between employers and employees, if not settled by compromise, must be settled by law and the courts. The community

The statement in the notices that they are not to be considered as intimidations show beyond doubt that the party sending the same knew that he was doing that which was unlawful, and by the statement sought to escape the penalties of his act.

§ 464. Effect of act of congress to legalize incorporation of National Trade Union.—The act of congress entitled “An act to legalize the incorporation of a National Trade Union”¹ does not sanction the right to combine or conspire with a view to injure or oppress or interfere with the rights of others; nor does it sanction the use of a lawful organization for an unlawful purpose. Under this act labor may organize to regulate wages, the hours of labor and the conditions of labor, and for the protection of individual rights in the prosecution of labor; but such lawful organization cannot be employed to injure property, or for oppression of others, or to harm the public welfare.²

at large cannot afford to tolerate conflicts, from which outside and innocent parties must suffer. Courts do not interfere between employer and employees, except to declare what the rights of the parties are, and to keep order. Men may work or cease working as they choose, provided they violate no contract. They may combine and peaceably seek to forward their interest in any manner, provided they do no violence to others' rights, or commit no violation of law.”

¹ 24 R. S., ch. 567.

² *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. R. 903. The court said: “The statutes of Wisconsin (S. & B. Rev. Stat., § 4466a) render it unlawful for ‘two or more persons to combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or per-

forming any lawful act.’ By section 4466c it is rendered unlawful for any person by threats, intimidation, force, or coercion of any kind, to hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as wage worker, or to attempt to so hinder or prevent. By section 4466d a punishment is provided for any one who, individually or in association with others, shall wilfully injure or interfere with or prevent the running or operation or shall destroy any locomotive engine or cars or machinery. These statutes are declaratory of the common law and wholly condemn all conspiracies to injure or oppress or interfere with the rights of others. Their efficacy is in no way impaired by any statutory recognition of the right of organization for the purpose of promoting the welfare of labor. I have been referred to no statute in any state traversed by the Northern Pacific Railroad, and have been able to find none, which in any way changes the law in this regard. I think no state has gone so far in modification

§ 465. Liability of striking railway employees.— If an employee of a railroad company quits the service without cause, and in violation of an express contract to serve for a stated time, then his quitting is without right, and he is liable for any damages resulting from a breach of his agreement, and possibly to criminal prosecution for any loss of life or limb by passengers or others directly resulting from his abandoning his post at a time when care and watchfulness were required upon his part in the discharge of a duty he had undertaken to perform. And further, he would be liable where the contract of service, by necessary implication arising out of the nature or circumstances of the employment, required him not to quit the service suddenly and without reasonable notice; but a court of equity will not interfere by injunction to prevent one individual from quitting the service of another, or even from quitting the service of a receiver of the court.¹

of the general rule as have the states of New Jersey and Pennsylvania. But there, as elsewhere, all labor organizations must be for lawful objects, to be accomplished by lawful means. If the ostensible purpose be legal, and the means for its accomplishment legal, still, if the real and secret purpose be illegal — as, for example, that purpose be of extortion or of injury to another, — the wrong cannot be shielded under the guise of a lawful organization. And where the object is to be accomplished by violence, intimidation and destruction of property, by coercion and by injury to the public, the organization, although formed for an ostensible legal object, is diverted to illegal purposes, and is to that extent unlawful.”

Regarding the exceptionally favorable condition of an employee of a receiver, Judge Brewer again said: “An employee deeming himself wronged by the action of the receivers in respect thereto had peaceful remedy. The court was at all times open to him to listen to his complaint and to redress it, if it should appear to be

well founded. Upon such application the receivers would be bound to obey the orders of the court in the premises. The employee, nevertheless, not content with the judgment of the court, would have the right to abandon his employment. The case furnishes, as was suggested by counsel, an exceptional instance, where one party to a proceeding in a judicial tribunal is bound by the decision and the other is not.”

¹ Arthur et al. v. Oakes et al., 63 Fed. R. 310. This case came up on an appeal from an injunction issued by the circuit court for the eastern district of Wisconsin, and the appeal was heard before Justice Harlan of the supreme court, and Judges Wood and Bunn. In the opinion written by Justice Harlan he says:

“It would be an invasion of one’s natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude, — a condition which the supreme law of the land declares shall not exist within the United States or in any

§ 466. Strike of receiver's employees may be legal.—A combination among the employees of a receiver having for its object their orderly and peaceful withdrawal either in large numbers or in a body from the service of the receiver, on ac-

place subject to their jurisdiction. Courts of equity have sometimes sought to sustain a contract for services requiring special knowledge or peculiar skill, by enjoining acts or conduct that would constitute a breach of such contract. To this class belong the cases of singers, actors or musicians, who, after agreeing for a valuable consideration to give their professional service at a named place and during a specified time, for the benefit of certain parties, refuse to meet their engagement, and undertake to appear during the same period for the benefit of other parties at another place. *Lumley v. Wagner*, 1 De Gex, M. & G. 604, 617; *Id.*, 5 De Gex & S. 485, 16 Jur. 871; *Montague v. Flockton*, L. R. 16 Eq. 189. While in such case the singer, actor or musician has been enjoined from appearing during the period named at a place and for parties different from those specified in his first engagement, it was never supposed that the court could by injunction compel the affirmative performance of the agreement to sing or to act or to play. In *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*, 9 Ch. App. 331, 335, Lord Justice James observed that when what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the court has never found its way to do this by injunction. In the same case Lord Justice Mellish stated the principle still more broadly, perhaps too broadly, when he said that a court can only order the doing of something which has to be done once for all, so that the court can see to its being done.

"The rule, we think, is without exception, that equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employee engaged to personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable. *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. R. 730, 740 (Taft, J.), and authorities cited; *Fry, Spec. Perf.* (3d Am. ed.), secs. 87-91 and authorities cited.

"It is supposed that these principles are inapplicable or should not be applied in the case of employees of a railroad company, which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public are vitally interested. Undoubtedly the simultaneous cessation of work by any considerable number of the employees of a railroad corporation, without

count of a reduction of wages or for any other cause, is not necessarily unlawful. Such a combination may amount to a conspiracy, according to the means by which the strike is to be made effective. If among the objects of the combination is the injury or molesting either the receiver or other employees, or the injury or destruction of property, it is unlawful.

All strikes are unlawful which contemplate, either as a means or as an end:

1. To physically injure or cripple the trust property; or

previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and, although arising in many cases from the inconsiderate conduct of employees and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employees and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance and safe management of the public highways. In the absence of legislation to the contrary, the right of one in the service of a *quasi*-public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employee from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers, against their will, to keep a particular employee in their service. It was competent for the receivers in this case, subject to the approval of the court, to adopt a schedule of wages or salaries, and say to employees: 'We will pay according to this schedule, and if you are not willing to accept such wages you will be discharged.' It was competent for an employee to say, 'I will not remain in your service under that schedule,

and if it is to be enforced I will withdraw, leaving you to manage the property as best you may without my assistance.' In the one case the exercise by the receivers of their right to adopt a new schedule of wages could not, at least in the case of a general employment without limit as to time, be made to depend upon considerations of hardship and inconvenience to employees. In the other, the exercise by employees of their right to quit in consequence of a proposed reduction of wages could not be made to depend upon considerations of hardship or inconvenience to those interested in the trust property or to the public. The fact that employees of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their contract, or of the convenience and interests both of employer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employees, against their will, to remain in the personal service of their employer."

"The result of these views is that the court below should have eliminated from the writ of injunction the words, 'and from so quitting the service of the said receivers, with or without notice, as to cripple the property, or prevent or hinder the operation of said railroad.'"

2. To obstruct the receivers in the performance of their duties; or

3. To interfere with other employees of receivers who do not wish to quit work; or

4. To prevent by intimidation or other wrongful means, or by any device, the employment of others to take the places of the strikers.¹

Employees of a receiver may, if they desire, withdraw from such employment, and they may confer with each other upon any matters of interest to them as employees, and they may, if they see fit, withdraw in a body because of any proposed change of wages; and they may as a body demand given rates of compensation as a condition of their remaining in the service; but such organization for such legal purpose is very different from a combination and conspiracy among employees with the object and intent, not simply to quit the service of the receivers because of a reduction of wages, but to cripple the property in the hands of receivers and embarrass them in the operation of the railroad,—such combination and conspiracy is unlawful and may be enjoined, and if persisted in amounts to contempt of court.²

¹ Arthur et al. v. Oakes et al., 68 Fed. R. 810; Farrar v. Close, L. R. 4 Q. B. 602.

² Arthur et al. v. Oakes et al., *supra*. In this connection Justice Harlan said: "The general inhibition against combinations and conspiracies formed with the object and intent of crippling the property and embarrassing the operation of the railroad must be construed as referring only to acts of violence, intimidation and wrong of the same nature or class as those specifically described in the previous clauses of the writ. We do not interpret the words last above quoted as embracing the case of employees who, being dissatisfied with the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action, from the service of the receivers, using neither force, threats, persecution nor intimidation towards em-

ployees who do not join them, nor any device to molest, hinder, alarm or interfere with others who take or desire to take their places. We use the word 'device' here as applicable to cases like that of Sherry v. Perking, 147 Mass. 212, 17 N. E. R. 307, in which it appeared that parties belonging to a labor organization displayed and maintained certain banners in front of the plaintiff's place of business for the purpose of deterring workmen from remaining in or entering his service. As the acts complained of were injurious to the plaintiff's business and were a nuisance, it was held that they could be reached and restrained by injunction. So in Spinning Co. v. Riley, L. R. 6 Eq. 551, equity interfered by injunction to restrain the conduct of parties, officers of trades union, who gave notice to workmen, by means of placards and advertise-

But a combination or conspiracy to procure an employee or body of employees to quit service in violation of a contract of service is unlawful, and may be enjoined if the injury threatened would be irremediable at law.¹

ments, that they were not to hire themselves to the plaintiff pending a dispute between the union and the plaintiff. See also *United States v. Kane*, 23 Fed. R. 748; *Emack v. Kane*, 34 Fed. R. 46; *Casey v. Typographical Union*, 45 Fed. R. 135; *Walker v. Cronin*, 107 Mass. 555. These employees having taken service first with the company and afterwards with the receivers, under a general contract of employment which did not limit the exercise of the right to quit the service, their peaceable co-operation as the result of friendly agreement, persuasion or conference among themselves in asserting the right of each and all to refuse further service under a schedule of reduced wages would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to employees exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages,

and thereby cause dissatisfaction among employees and their withdrawal from service."

¹ *Arthur et al. v. Oakes et al.*, *supra*. "It is one thing for a single individual, or for several individuals each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent, not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

In support of this proposition Justice Harlan cites and reviews at some length the following cases already referred to in this work: *Callan v. Wilson*, 127 U. S. 540, 555, 8 Sup. Ct. 1301; *Com. v. Hunt*, 4 Met. 111, 121; *State v. Burnham*, 15 N. H. 396, 401; *Reg. v. Parnell*, 14 Cox, Cr. Cas. 508, 514; *Com. v. Carlisle*, *Brightly*, N. P. 36, 38, 40; *Stewart v. Stewart*, 59 Vt. 273, 286, 9 Atl. R. 559; *State v. Buchanan*, 5 Har. & J. 317, 352, 355; *State v. Glidden*, 55 Conn.

§ 467. **Other unlawful acts.**—It is needless to say that there are many other unlawful acts of which combinations of labor are frequently guilty. For instance, under the obstruction of the use of highway by “picketing,” and in the use of the “boycott,” and in the posting of notices, the carrying of banners, devices, etc., labor combinations may be guilty of acts which are not only unlawful but are at the same time oppressive. It is deemed best, however, to discuss the use of the “boycott,” “picketing,” strikes, etc., under the head of “Acts which are oppressive.” It is sometimes difficult to draw the line exactly and say where acts which are oppressive and injurious become positively unlawful; just as it is often difficult to say when anything that is undoubtedly a private nuisance and highly injurious to one person becomes by its extension and intensification a public nuisance and contrary to law, if not criminal.

B. CONSPIRACIES OF LABOR TO DO THAT WHICH IS OPPRESSIVE.

§ 468. **Damage resulting from unlawful acts done by combination.**—If one is damaged by the unlawful act of another he is entitled to recover regardless of the motives of the other.

46. 75, 8 Atl. R. 890; *Queen v. Kenrick*, 5 Q. R. 49; *Carew v. Rutherford*, 106 Mass. 1, 13; *Steamship Co. v. McKenna*, 30 Fed. R. 48; *Coeur d'Alene C. & M. Co. v. Miners' Union*, 51 Fed. R. 260, 267; 3 Whart. Cr. Law (8th ed.), § 1337 et seq.; 2 Archb. Cr. Pr. & Pl. (Pom. ed.) 1830, note; 2 Bish. Cr. Law, § 180 et seq.

The court proceeds: “It seems entirely clear upon authority that any combination or conspiracy upon the part of these employees would be illegal which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use engines, cars, or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats or other wrongful methods

against the receivers or their agents, or against employees remaining in their service, or by using like methods to cause employees to quit, or prevent or deter others from entering the service in place of those leaving it. The combinations or conspiracies which the law does not tolerate are of a different character. According to the principles of the common law a conspiracy upon the part of two or more persons, *with the intent*, by their combined power, to wrong others, or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employee or body of employees to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law.”

If the act be unlawful it is quite immaterial in a civil suit for damages whether it be done by one or by a number confederating together; the party injured may recover his damages from the one or from the many confederating together, or from any one, two or more of the confederates.

§ 469. Damage resulting from lawful acts done by combination.— If, however, the act that occasions the injury be lawful, then the question whether or not the party injured can recover damages sustained becomes exceedingly nice, and it is a question upon which the decisions are by no means harmonious.

To enumerate the possible cases that may be presented:

(1) Damage occasioned by an act not in itself unlawful, done by one in the legitimate pursuit of his own lawful business, and with no intention of damaging the party injured;

(2) Damage occasioned by an act not in itself unlawful, done by one in the legitimate pursuit of his own lawful business, but at the same time with the intent to damage the party injured;

(3) Damage occasioned by an act not in itself unlawful, done by one for the sole purpose of inflicting injury upon the party damaged.

In the foregoing cases combination is excluded; in the following the element of combination is included:

(4) Damage occasioned by an act not in itself unlawful, done by a combination in the legitimate pursuit of its own lawful business, and with no intent to injure the party damaged;

(5) Damage occasioned by an act not in itself unlawful, done by a combination in the legitimate pursuit of its own lawful business, but also with the intent to injure the party damaged;

(6) Damage occasioned by an act not in itself unlawful, done by a combination for the sole purpose of inflicting injury upon the party damaged.

§ 470. There are no hard-and-fast lines dividing these several cases one from the other. Between, for instance, a damage occasioned by an act, not in itself unlawful, done by a party in the legitimate pursuit of his own lawful business and with no intent to injure the party damaged, and the damage occasioned by an act, not in itself unlawful, done by a party with the sole intent to injure the party damaged, the grada-

tions are almost infinite; and yet the difference between the two classes of cases is one of kind rather than of degree. In the one case there is no element of wrong whatsoever; in the other case the element of wrong completely overshadows the transaction; the one is moral, the other immoral; and while it would be possible to cite a series of illustrations in which the element of wrong would enter in an increasing proportion until it completely embraced the case, that does not alter the fact that the difference between the cases embraced in the first category and those embraced in the third is a difference of kind.

The subtle casuist might argue that the element of wrong begins to make its appearance with the first intimation of an intent to damage the injured party, and that, therefore, the difference between the cases embraced in the first category and those embraced in the second is a difference of degree rather than of kind, since in the cases embraced in the second category the damage is occasioned by an act not in itself unlawful, done by a party in the legitimate pursuit of his own lawful business, but who at the same time harbors an intent to injure the party damaged. But even here the casuist would find himself involved in difficulties with the definition of the term "wrong."

Neither the law nor common sense, however, pays any attention to the subtle refinements of casuistry. The element of wrong which so radically distinguishes the cases embraced in the third category from those embraced in the first does not make its appearance with simply a malicious purpose. An act not in itself unlawful, done by one in the legitimate pursuit of his own lawful business, even though it be also done with the malicious intent to injure another, does not thereby become either unlawful or wrong as the term "wrong" must necessarily be understood in the administration of the law. The civil law does not aim to punish motives; it takes cognizance of acts and their consequences, though in a number of instances it considers the motive as a part of the entire case. The element of wrong of which the civil law takes cognizance in the administration of justice between man and man, in the enforcement of rights and the application of remedies, is that character of wrong which contains within it not only the element of malice, but of malice rendered effective in conduct. That is to

say, the mere presence of malice does not give rise to a cause of action, even though damage result from the entire transaction in which malice enters as one of the motives. The law will not attempt the impossible task of disintegrating the final results and saying that so much of the result — namely, the damage caused — was due to acts influenced wholly by malice, and so much of the result was due to acts influenced wholly by legitimate motives.

But when it clearly appears that there is an entire absence of legitimate motives, and that the damage is occasioned by acts which are the result of a deliberate intent to injure, then the law has, or should have, no difficulty in stamping the transaction, considered as an entirety, unlawful, and awarding the party injured whatever damages he has suffered. Such a conclusion does not involve the proposition that malice in and of itself is a cause of action, since a man may do many things not in themselves unlawful in the legitimate pursuit of his own lawful business, but at the same time with the malicious intent to injure others; but a man may not do wantonly and without any hope or expectation of profit or legitimate advantage to himself that which he knows must and which he intends shall inflict damage upon another. The practical question for court and jury is not so much whether or not malice exists as it is whether or not the acts complained of were done in the legitimate pursuit of a legitimate business, or the legitimate exercise of some personal privilege; if so, then there is no redress for the party injured, since the law cannot undertake to distribute the damage according to the preponderance of the motives.

§ 471. The distinction herein suggested was pointed out by Chief Justice Holt in 1707 in *Keeble v. Hickeringill*.¹ In that case the defendant was sued for damages for discharging guns near the decoy pond of another, with the malicious design of frightening away the wild fowl. The discharge of the guns was not *per se* unlawful. Chief Justice Holt said: "Now there are two sorts of acts for doing damage to a man's employment, for which an action lies: the one is in respect of a man's privilege, the other is in respect of his property. . . . The other is where a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood; there an action

¹ 11 East, 573, n.; 11 Mod. 74, 130; 3 Salk. 9.

lies in all cases. But if a man doth him damage by using the same employment — as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff — no action could lie.”¹

§ 472. It follows, therefore, that no cause of action arises in the cases embraced within categories 1 and 2, but a cause of action is found in cases embraced in category 3.

The common law is so tender of personal liberty and the independence of the individual that it is exceedingly reluctant to investigate motives, and it ever prefers to consider acts and their consequences, awarding damages and determining guilt accordingly, without too nice a discussion of the motives — of the interminable chain of causes which lead up to the acts themselves. It is, no doubt, these considerations which have led many courts to hold broadly that there could be no recovery for damages of the most serious nature if those damages were due to acts not in themselves unlawful, although done by parties with the sole intent to injure those damaged.

But the conclusion above reached does not necessarily involve any inquisitorial investigation into motives; it does not necessarily involve any inquiry into the extent of either the good will or the hatred that one man may bear another; it does not involve any investigation as to the justification of the dislike or aversion one man may feel toward another. The conclusion rather involves an investigation of facts more or less susceptible of proof by disinterested witnesses. The question whether or not any given acts were done in the legitimate pursuit of a legitimate business is a question of fact easy of demonstration. If not so done, then the acts must necessarily have been done as part of some unlawful purpose, or wantonly. If done as part of some unlawful purpose and damage is occa-

¹ Lord Field, in his opinion in the *Mogul Steamship* case (58 L. J. Q. B. 465, 23 Q. B. D. 614), referred with approval to the principles laid down by Chief Justice Holt in *Keeble v. Hickeringill*, *supra*, and said: “Acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject

of any action. Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him and not the pursuit of lawful rights.”

sioned, it is needless to say there can be a recovery. So, also, it would seem equally reasonable that if the acts are done wantonly and damage is occasioned, there should be a recovery. But the intent to injure in a case where the acts are done wantonly is always easy of proof by either direct or circumstantial evidence. The extent of this intent is not a matter of vital consequence, although a jury will invariably give it more or less weight.

§ 473. It may be urged, with much show of reason, that a wanton or an idle or a useless act is not a lawful act in the true sense of the term "lawful." A man may have the right to do an act which is utterly idle and useless, but that right can hardly be described as a legal right, for the reason that the law takes no cognizance of the act; it neither forbids it nor encourages it. Under no conceivable circumstances would the law compel the doing of a wanton, idle or useless act. The law does not attempt to cover and provide for every act that human ingenuity can devise. This distinction is noted in the following paragraph from the opinion of Cave, J., in *Allen v. Flood*:¹ "The personal rights with which we are most familiar are: (1) Rights of reputation; (2) Rights of bodily safety and freedom; (3) Rights of property, or, in other words, rights relative to the mind, body and estate; and if the general word 'estate' is substituted for 'property,' these three rights will be found to embrace all the personal rights that are known to the law; but in that case it must be admitted that the third class is very general and embraces a good many subdivisions, which, however, like causes in natural science, are not to be unnecessarily multiplied. In my subsequent remarks the word 'right' will, as far as possible, always be used in the above sense; and it is the more necessary to insist on this, as during the argument at your lordships' bar it was frequently used in a much wider and more indefinite sense. Thus it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right the violation or disturbance of which can be remedied or prevented by legal process."

¹ (1897) 67 L. J. Q. B. D. 119.

It is therefore no infringement of a man's legal rights to hold that he cannot do wantonly that which will occasion damage to another. Where legal rights clash, the law does not attempt to estimate and distribute the damage according to any preponderance of rights; but conceding that one has the abstract right to do an idle, useless and wanton act, such abstract right does not amount to a legal right; and while the law will not permit the recovery of damages sustained as the result of the exercise of a legal right, it will permit the recovery of damages by one whose legal rights have been wantonly or maliciously infringed by another in the exercise of some abstract right.¹

¹ The remarks of Hawkins, J., in *Allen v. Flood* (1897), 67 L. J. Q. B. D. 119, concerning the case of *Temperton v. Russell* (1893), 62 L. J. Q. B. 412, are of interest in this connection: "I must now deal with the case of *Temperton v. Russell*, *supra*, which was tried before Mr. Justice Collins, and deserves serious attention. The action was for maliciously inducing persons to break their trade contracts with the plaintiff, and secondly for conspiring to induce persons not to enter into contracts with him. Under the direction of the learned judge, confirmed to its fullest extent by the court of appeals, the jury found, and the judgment was entered, for the plaintiff. In the present case no contract was broken, and no such conspiracy to induce the Glengall Company to dismiss the plaintiffs, as was alleged in the pleadings, was proved. For the defendant it was urged that without conspiracy there was no legal cause of action arising out of the conduct of the defendant. Upon this point, however, Lord Esher, in *Temperton v. Russell*, *supra*, distinctly expressed his opinion that there was no substantial distinction between a malicious inducement to break and a similar inducement not to enter into new contracts

of service, and that the latter claim was maintainable without the element of conspiracy. In this I cordially agree. A person whose livelihood is earned by working for others needs a constant succession of contracts for employment for the profitable maintenance of his calling. Whether such contracts are for longer or shorter periods is immaterial. Without such engagements his calling could not exist. Wrongfully to induce an employer to break his contract and discharge his workman is wrongfully to injure that workman by disabling him from earning his wages. Wrongfully to coerce an employer to terminate an existing contract before its appointed time brings upon the employed precisely the same character of injury. The coercion of a would-be employer not to enter into future contracts for employment with a particular workman prevents that workman from earning the wages which would have accrued to him as the result of his employment. In each of these cases the sinister object of the wrong-doer is the same—namely, to hinder the workman in his calling—and the same character of injury is the result. I fail to see any distinction in principle between them."

§ 474. Cases arising under the fourth, fifth and sixth categories.—The cases arising under the fourth, fifth and sixth categories are radically distinguished from those arising under the first, second and third, by the intervention of the element of combination. It is frequently said that what an individual may lawfully do a combination may lawfully do, and in the opinion of the writer this is true, or should be true, in so far as the criminal law is concerned. It is also true, or should be true, that what one man may legitimately do in the pursuit of a lawful business, a combination of individuals may legitimately do in pursuit of the lawful business of the combination. In other words, when either a criminal conspiracy or the pursuit of a legitimate business is under consideration, then the proposition holds good that whatever an individual may lawfully do a combination may likewise do; but when the oppression or injury of another is involved, then it is not true to say that what an individual may lawfully do a combination may likewise do.

The combination is in itself an act; it is the consummation of a purpose, although it is a means to an end. For instance, as has already been shown in considering criminal conspiracies, the conspiracy is the gist of the offense, and, except where otherwise provided by statute, the proof of the conspiracy is sufficient to warrant conviction, although no act be done in pursuance of the conspiracy. On the civil side, however, proof of the conspiracy alone is not sufficient to warrant either a verdict or judgment for damages. Unless damages are sustained the cause of action is incomplete. It is not quite accurate, however, to say that the damages are the gist of the action in a suit to recover for injuries sustained by reason of a civil conspiracy. Under that line of authorities which hold that there can be no recovery for damages sustained as the result of the acts of a combination or conspiracy unless the acts are unlawful, it is true that the damages constitute the gist of the action, and not the conspiracy; for if the acts which occasion the damage are unlawful, it matters not whether they were done by an individual or by two or more in combination. But under the line of authorities which hold that damages may be recovered if occasioned by a combination to oppress or injure, even though the acts done by the combination, considered

in and by themselves, are not unlawful, then the cause of action is made up of (*a*) the damages sustained, plus (*b*) the conspiracy; that is to say, proof of the damages occasioned by a conspiracy to oppress and injure constitutes a cause of action even though the acts pursued by the conspiracy in the attainment of its object are not in themselves unlawful.

§ 475. Both courts and legislatures — and in this respect they are in strict accord with common sense — recognize the force of a combination; that it is something more than the mere sum of the individualities that compose it; that its power is something quite different from the mere aggregate of the powers of the parties to the combination; that it is in a very material sense a powerful factor for good or evil. It will not do, therefore, to treat a combination as simply an aggregate of independent parts, and measure its rights and responsibilities by the rights and responsibilities of its individual members. This is not done in the criminal law, and there is no reason why it should be done in the administration of justice on the civil side.

An individual may occasion serious damage to another by arbitrary and oppressive conduct without being liable for the damages so occasioned. In pursuit of his own lawful avocations an individual may deliberately choose a course of action which, while serving his own ends, will at the same time oppress, embarrass and even ruin others. With such conduct the law cannot interfere, since it does not attempt to enforce a code of ethics. But with a combination the case is different; for while the law will not attempt to probe the motives and intentions of the individual and to distribute results according to the preponderance of the motives, the law may very properly determine whether or not damages complained of were occasioned by a conspiracy the object of which was to cause the injury in question; for such investigation is not so much an investigation of motives as it is the determination of a question of fact, namely, whether two or more parties combined together for the purpose of oppressing and injuring another. Such an investigation on the civil side is attended with no greater difficulties than a similar inquiry on the criminal side, where the question at issue is whether or not two or more parties combined for some criminal purpose.

§ 476. The fourth, fifth and sixth categories considered.— In the light of the foregoing considerations the fourth, fifth and sixth categories may be disposed of as follows:

§ 477. (4) “Damage occasioned by an act not in itself unlawful, done by a combination in the legitimate pursuit of its own lawful business, and with no intent to injure the party damaged,” does not give rise to a cause of action, for the very obvious reason that no conspiracy — either civil or criminal — is involved. The damage may be serious, it may extend to the ruin of the injured party; but inasmuch as it is occasioned by the lawful acts of a combination engaged in the legitimate pursuit of its legitimate business, and with no intent to cause injury, there can be no recovery. For while one element of the cause of action is present, namely, (*a*) the damage, the second essential element, namely, (*b*) the conspiracy, is absent.

§ 478. (5) “Damage occasioned by an act not in itself unlawful, done by a combination in the legitimate pursuit of its own lawful business, but also with the intent to injure the party damaged,” may or may not give rise to a cause of action, the test being whether or not the particular act in question, even though done by the combination in furtherance of its own legitimate business, was also done as the result of a conspiracy to injure the party damaged. This may seem a somewhat subtle refinement, but it is less subtle than it seems. The motive of a combination being a matter of fact susceptible of direct proof, it is not difficult to determine whether or not at a given time a certain course of action was selected for the purpose of legitimately advancing the interests of the combination or for the purpose of injuring and oppressing a third party. And even though it should be explicitly denied that at the time the course of action was agreed upon there was any discussion of the effect it would have upon the third party, or any expression of an intent to injure such party, still it is a question of fact, susceptible of proof, whether or not, at the time the course of action was agreed upon, the combination must not have known that, while the action might benefit the combination, yet it must necessarily damage or ruin the third party.

§ 479. In short, a combination has not the same freedom of action in these respects that an individual has. It must use

the power which results from the combination with discretion and cannot use it either maliciously or recklessly. If it does use its power either maliciously or recklessly it runs the risk of being held a criminal conspiracy if its acts or objects are of a criminal character, or a civil conspiracy if its purpose is to oppress and injure others. A combination otherwise lawful and innocent may at any moment become a civil conspiracy by determining upon a course of action the contemplated or necessary consequences of which are to oppress and injure others.

§ 480. (6) "Damage occasioned by an act not in itself unlawful, done by a combination for the sole purpose of inflicting injury upon the party damaged," gives rise to a cause of action. The law would be singularly defective if it should permit two or more to combine together for the sole purpose of inflicting loss and injury upon another. Those courts which hold that damages sustained cannot be recovered from an individual who maliciously occasions them by acts not in themselves unlawful are apt to hold that damages so occasioned by a combination cannot be recovered; but even though it should be held that cases arising under the third category do not afford a cause of action, the distinction between an individual and a combination is of so radical a character that it by no means follows that cases arising under the sixth category afford no cause of action. Any combination, no matter how lawful its origin nor how praiseworthy its objects, which turns aside for the moment from its legitimate pursuits and agrees upon a course of conduct for the sole purpose of inflicting injury upon a third party, becomes at that instant a civil conspiracy, and all damages sustained may be recovered.

§ 481. The discussion of the very interesting questions herein involved may be conveniently pursued in connection with two celebrated English cases, namely, *Allen v. Flood* and *Huttly v. Simmons et al.* In the former no element of conspiracy was involved; in the latter there was a conspiracy. In the former the case, as finally presented, was against a single defendant who was a delegate of a trade union, for causing loss and damage to two workmen who were discharged as a result of representations or threats to the employers by the defendant that if the two workmen were not discharged a strike would be

called. In the latter case the suit was by a cab-driver against certain members of a trade union for damages sustained by reason of their having induced a cab proprietor to refuse to engage the driver or to let any cab to him.

§ 482. *Allen v. Flood* (1897).¹ — In this celebrated case the facts were as follows: The plaintiffs were two shipwrights (Flood and Taylor), employed by the Glengall Iron Company. They were employed together with a large number of boiler-makers upon the repairs of a particular ship, and according to the custom of the employment they were taken on "for the job;" but while the work would ordinarily last to the end of the job, it was not disputed that they could be discharged at any time, or could leave of their own accord without violating any contract.²

§ 483. The defendant was a member of a very powerful union called "The Independent Society of Boiler-makers and Iron and Steel Ship-builders," a society of about forty thousand members. He was not in the employ of the Glengall Company, but was the London delegate of the union. Owing to the fact that the plaintiffs some months before, and while in the employ of another company, had done iron-work, which was contrary to the regulations of the boiler-makers' union, which union objected to the doing of iron-work by shipwrights, the boiler-makers in the employ of the Glengall Company objected to the further employment of the two plaintiffs, and sending for the defendant, who was the London delegate, an interview was had with the managing director of the company. The defendant began the interview by saying he had received word by some of the boiler-makers working in the company's yard that they wanted to see him, and that he had had an interview with them, and they told him that the company had two shipwrights engaged in their employment who were known to have done

¹ 67 L. J. Q. B. Div. 119.

² "The job on the 'Sam Weller' lasted in fact about a fortnight, and there was every reason to suppose the plaintiffs would, but for the interference of the defendant, have been continued upon it until it was finished. They were very good shipwrights, of excellent character, and

had always behaved themselves and done their work properly and satisfactorily. They were and are members of the 'Shipwrights' Provident Union,' a union consisting of a comparatively small number of men, and confined to shipwrights of the port of London." *Id.*, p. 122.

iron-work before in Mills & Knight's yard; and that unless those two men were discharged from their employment that day, all the boiler-makers belonging to his society would on that day leave off work. Mr. Halkett said it was very hard to be interfered with, and that the men were not doing iron-work in the company's yard. The defendant thereupon said: "We are doing our best to put an end to the practice of doing iron-work by shipwrights;" adding that "it was not from any ill-feeling against ourselves, nor against any men in particular; but they had made up their minds that, wherever it was known that any shipwrights had been engaged doing iron-work, the boiler-makers would cease work on the same ship on the same employment, and that they would be withdrawn from every ship or every job upon which they were engaged." With regard to Flood and Taylor he said: "These men were known, and wherever they were employed the same action would be taken there as in our place." "You have no option; if you continue to engage these men, our men will leave," or "will be called out." As a result of the interview the two men were discharged.¹

¹ "Mr. Edmonds was present in Mr. Halkett's office during the greater part of this interview. This is his account of it: 'Mr. Halkett sent for me, and when he got to the room he said: "Mr. Allen has come here and says if those two men, Flood and Taylor, are not discharged, all the iron-men will knock off work or be called out." (I will not be sure which term he used.) I asked Mr. Allen the reason why. He said because those two men had been working at Mills & Knight's on iron-work. I told him I thought it was very arbitrary on his part to do anything like that; I thought it was not right that Mills & Knight's sins should be visited upon us, for the reason that we were not employing the shipwrights on iron-work, and never had done so at the Glengall. He said the men would be called out from any yard they went to.' In consequence of that interview, Mr. Halkett, in Allen's presence, then and there gave instructions that they were to be discharged, and not employed any more until the thing was settled, and told Mr. Edmonds if he, when engaging men, knew of any shipwrights having been working on iron-work elsewhere, 'for the sake of peace and quietness for ourselves,' he was not to employ them. On the same day Flood and Taylor were discharged, and were not again employed by the Glengall Company, except for three hours, in merely docking a ship at another dock, on the following day. It was on account of the expressions, 'You have no option,' etc., that the plaintiffs were discharged by Mr. Halkett, who was in fear of the threat being carried out, which would seriously have impeded the business of the Glengall Company, the threat being extended to every iron-workman in the employment of the company at whatever place employed." *Id.*, p. 123.

§ 484. Under these conditions Flood and Taylor brought an action against Allen and certain officers of the Boiler-makers' Union to cover the damages sustained, but at the trial it was shown that the officers of the union had not authorized Allen to act as he did; in other words, they showed that they were not parties to any conspiracy, and the action was dismissed as to them. The trial court left two questions to the jury:¹ "(1) Did Allen maliciously induce the company to discharge the plaintiffs? (2) Did Allen maliciously induce the company not to employ the plaintiffs? The jury replied to both in the affirmative, and judgment with £40 damages was given for the plaintiffs; this judgment was affirmed by a unanimous judgment of Lord Esher, M. R., Lopes and Rigby, L. JJ., in the court of appeal in the following March. An appeal from this judgment was heard before the House of Lords (the lord chancellor and Lords Watson, Herschell, Macnaghten, Morris, Shand and Davey), but as they were divided in opinion the appeal was reheard in March, 1897, before a house strengthened by the addition of the lord chancellor of Ireland and Lord James of Hereford. To give greater weight to the occasion the lords summoned to their assistance, in order to advise them as to the law applicable, eight of her majesty's judges — a course which had not been adopted since 1881. These judges attended and sat in state to hear the argument, and afterwards, by a majority of six to two, advised that the appeal should be dismissed."²

§ 485. At the close of the arguments upon this appeal in the House of Lords the judges then in attendance were requested to answer this question: "Assuming the evidence given by the plaintiff's witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" Hawkins, Cave, North, Wills, Grantham and Lawrence, JJ., answered in the affirmative; Matthew and Wright, JJ., answered in the negative.

In the House of Lords the lord chancellor (Lord Halsbury), Lord Morris and Lord Ashbourne held that an action would lie; Lord Watson, Lord Herschell, Lord Macnaghten, Lord Shand,

¹ See *Flood v. Jackson* — as the case was first known — (1895), 2 Q. B. 21. See also note in 32 Am. Law Rev. 463, and 11 Harvard Law Rev. 405.

² See 18 Canadian Law Times, p. 121, for an interesting article by N. W. Hoyles.

Lord Davey and Lord James of Hereford held that an action would not lie.¹

§ 486. In the course of his opinion Hawkins, J., said: "For the defendant it was speciously urged that the plaintiffs had no legal right either to insist upon the continuance of the contract which was in existence on the morning of April 13, or to claim from the Glengall Company new contracts of employment in the future; and therefore the abrupt termination of one, and the refusal to enter into the other, were both lawful when done by the company. In this I entirely agree; but it is a fallacy to suppose that the defendant can justify the wrongful conduct attributed to him in bringing about these acts of the company simply because it was not unlawful in the company to do them. The wrongful conduct of the defendant complained of

¹ In so far as this case may be considered an authority in the courts of the United States, it must be considered as sustaining the proposition that the facts disclosed a cause of action. The writer in the *American Law Review* well says: "Under the doctrine of judicial precedent as it obtains in England,—and such would be the rule in this country,—the opinion of the six law lords and the two judges, opposed as it is to the opinions of three lords and ten judges, becomes, in substance and effect, the law of England until it is overturned by the same ultimate tribunal or changed by an act of parliament. In the argument of counsel at the bar of the lords, but two American cases were cited, and we do not see that they were referred to in the opinion delivered by the judges and the lords respectively. We have as good materials for jurisprudence in this country—and a good deal of it on this very subject—as they have in England, though not as ancient. Such being the neglect of American judicial opinion and extent to which the judges of England were divided upon the question involved in this remarkable case, we submit that it is

not entitled at the hands of the bench and bar of America to anything in the nature of a fetish worship. It is not binding upon our judges except as persuasive authority. The opinions of those judges and lords who took part in the case ought to have with us the persuasive influence which the arguments put forth in them are entitled to, and no more. If any consideration is to be given to the weight of mere numbers, there is a preponderance of thirteen against eight, or nearly two to one, in favor of the right of action. Nor should the highest consideration be given in this country to a decision which is opposed to the views of the four judges who participated in the case below, and to the views of six out of eight of the judges who were summoned to give their opinions at the bar of the lords, and from which three out of nine of the lords dissented. On the contrary, it seems that while this decision is authoritative in England against a right of action upon the same state of facts, it ought really to be regarded in this country as persuasive authority in favor of such a right of action."

preceded and brought about the injurious though lawful action of the Glengall Company; and the plaintiff's grievance is not against the company for their action, but against the defendant for using wrongful means to bring it about in order to accomplish the unlawful and hurtful objects he or the boiler-makers had in view. I venture to think no authority is needed for this."¹

§ 487. Regarding the term "malice," Hawkins, J., said: "When malice is an essential element in a cause of action, it is difficult to express in a sentence; for in legal acceptance the terms 'malice' and 'maliciously' comprise so many wrongful motives and acts, the cases bearing upon them are so numerous, and the pleaders, both ancient and modern, so far as they exist, have been in the habit, out of extreme caution, of grouping them with such a host of other expletives that one derives but little valuable information from the mere use of the terms as to the sense in which they are employed. The definition of legal malice which most thoroughly commends itself to my mind is that expressed by Mr. Justice Bayley in *Bromage v. Prosser*, which is the basis of most of the definitions of the word to be found in a host of subsequent authorities. 'Malice,' said that very learned judge, 'in common acceptance means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.'"²

¹ Continuing, Hawkins, J., said: "In the course of the argument it was suggested that to render threats, menaces, intimidation or coercion available as elements in a cause of action, they must be of such a character as to create fear of personal violence. I find, however, no authority for such a suggestion; for although, no doubt, it is true that in many of the cases the threats were, in fact, threats of personal injury, I know of none in which the element of personal violence has been held to be essential." And further: "In my opinion any menacing action or language, the influence of which no man of ordinary firmness or strength of mind can reasonably be expected to resist if used or employed with the

intent to destroy the freedom of will in another, and to compel him through fear of such menaces to do that which it is not his will to do, and which, being done, is calculated to cause injury to him or some other person, amounts to an attempt to intimidate and coerce; and, if such attempt is successful, the object attained under such influence is attained by coercion, and the person wrongfully injured by it, whether in his person, property, or rights, may sue the coercer for reparation in damages."

² The question of malice as an element of a right of action is discussed by North, J., as follows: "The proposition was laid down boldly by the appellant's counsel, that if a man

§ 488. In the course of his opinion Wills, J., said: "That the object the defendant had in view was the punishment of the plaintiffs for having done acts which were perfectly lawful, but which the defendant believed it was for the advantage of

commits an act which is not itself illegal or tortious, it cannot be rendered actionable by reason of its having been done with a malicious intent. I do not understand the proposition. A malicious act has been described in hundreds of cases, both civil and criminal, as a 'wrongful act done intentionally without just cause or excuse;' the element of wrongfulness is essential, and an act which *ex hypothesi* is not wrongful or tortious cannot in accurate legal phraseology be a malicious act. If the proposition intended is that an act itself legal cannot be rendered actionable by being done from a wrong motive, such as spite or ill-will or vindictiveness, or merely to vex or annoy, I deny that the proposition is sound in law or universally true. It is much too large. Each case must be considered separately. In many cases, no doubt, the proposition is correct. A man is not liable to an action for sinking a well which drains his neighbor's, even though the sole object be not to get water for himself, but to spite his neighbor by depriving him of his necessary supply. A man may lawfully drain his own land, even if his sole object be vexatiously to prevent another from having the benefit of an overflow he has previously enjoyed. Numerous other illustrations might be given. But there are many cases in which the existence of a wrong motive, or malice, in the popular meaning of the word, does render that actionable which in its absence would not be so. *Gibbs v. Pike* (1842), 12 L. J. Ex. 256, 9 M. & W. 351, was an action for wrongfully registering as a judgment under 1 and 2

Vic., ch. 110, an order of the court of chancery. Baron Alderson there says: 'How then is his registering the order an injurious or wrongful act to any one? It is clear it is not. It causes no damage—it is no injurious act; and therefore, in order to enable the plaintiff to maintain this action, it is incumbent on him to show that this act, in its nature not wrongful, has become so in consequence of its having been done through a bad motive. For this purpose, and in order to render the act wrongful and injurious, he is bound to add to the fact of registering the order the absence of reasonable and probable cause, and a malicious motive for doing so.' I pass over without comment actions for libel or slander, as Lord Coleridge's remarks thereon in *Bowen v. Hall* (1881), 50 L. J. Q. B. 305, 6 Q. B. D. 333, seem to me of some weight. In *Ratcliffe v. Evans* (1892), 61 L. J. Q. B. 535, (1892) 2 Q. B. 524, Lord Bowen, in giving the judgment of the court of appeal, says: 'That an action will lie for written or oral falsehood, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title.' In *Bradford Corporation v. Pickles* (1894), 64 L. J. Ch. 101, (1895) 1 Ch. 145, Lord Justice Lindley says: 'The only question a court of law or equity can consider

the boiler-makers to prevent them from repeating, or others from doing, seems to me absolutely beyond controversy, though perhaps I ought rather to say that there is abundance of evidence to that effect. As a means to an end which he believed would be advantageous to the boiler-makers, he, beyond all doubt, meant to inflict upon the plaintiffs as much mischief as lay in his power, and there is ample evidence that it was the interference of the defendant which induced the employers to refuse to continue the employment of the plaintiffs. To prevent a workingman from earning his daily bread in any of the places where alone he was likely to find the opportunity of so doing is to cause him as direct and as great a damage as can well be inflicted upon him. There is no doubt that this was the defendant's avowed object. The act done by the de-

is whether the defendant has a right to do what he threatens and intends to do. If he has, he cannot be interfered with, however selfish, vexatious or even malicious his conduct may be.' But the learned judge's very next words show that he was dealing with the particular case before him, and that in his view there are cases in which an improper object or motive does make an otherwise lawful act actionable. An action for malicious prosecution is a good instance of such cases. Unless the plaintiff can prove the absence of reasonable and probable cause for the prosecution, the right to prosecute is absolute, and the motive is just as immaterial as it would have been if the prosecution had succeeded. Even when such cause is shown not to exist, the defendant may still succeed if he can prove that he acted without malice — *e. g.*, that he did *bona fide* believe there was reasonable cause to prosecute. The plaintiff cannot claim to be protected against a prosecution where there is reasonable and probable cause, or even where there is no such cause, but there is an absence of malice. If such cause is absent, and

there is malice, the prosecution is wrongful; and the one vital question there is as to the intention of the prosecutor, the state of his mind; did he act with malice or not? If he did, the action against him will succeed; if not, it will fail. While on this subject I crave in aid the decision in the *Mogul Case* (1892), 61 L. J. Q. B. 295, (1892) A. C. 25, itself. The *ratio decidendi* there was that the acts of the defendants were all within the limits of allowable trade competition; but the case would have been very different if the defendant's acts had been without just cause or excuse. I have quoted Lord Coleridge's and Lord Bowen's language on the subject; and the same idea is expressed in some of the other speeches, and appears to invade many of them. It seems to me, if I may say so with deference, that it would have been useless to consider at length in that case whether the defendants had just cause or excuse for what they did, if the plaintiffs would have had no right of action for interference with their trade, even though the defendants had been acting maliciously, and no just cause or excuse had existed." *Id.*, p. 140.

fendant was therefore one both calculated and intended to inflict upon the plaintiffs great loss and suffering.”¹

§ 489. The lord chancellor, after reviewing the earlier cases, said: “I now revert to that part of the case which I admit

¹Continuing, the learned judge said: “There are of course acts which are unmistakable violations of definite legal rights, as to which no controversy can arise and as to which motive cannot be material. A good motive will not make them the less actionable; a bad motive will not make them the more so. There are, on the other hand, acts which a man has a definite legal right to do without any qualification, and which therefore cannot be actionable. Here again motive is immaterial. A good motive does not increase, a bad motive does not diminish, the right to do them. If no interference with ancient lights, for instance, be involved, a man may erect upon his own land a building which may ruin his neighbor’s industry exercised upon the adjoining land. No action could be maintained, though it were demonstrated that his only purpose in making the erection was to spite and damage his neighbor. Illustrations might be multiplied to any extent. Equally, any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right. It is hardly too much to say that some of the most cruel things that come under the notice of a judge are mere exercises of rights given by contract—a fact illustrated, perhaps, by some of the decisions upon bills of sale. In such cases it is, I apprehend, perfectly clear law, that the addition to the statement of the cause of action of the epithet ‘malicious,’ and proof that the thing was done from the worst of motives, will not make

the matter complained of actionable. *Bradford Corporation v. Pickles*, 64 L. J. Ch. 759, (1895) A. C. 587. Certainly no one is more keenly alive than myself to the mischief that would be caused by any relaxation of this rule. But there is a large class of cases which belong to an intermediate category, and in which it can neither be said that the thing done by the defendant gives an indisputable and unqualified right of action, no matter what the circumstances, nor can it be said that the defendant has an absolute and unqualified right to do it, whatever the consequence to others. These are exercises of personal freedom which are perfectly legitimate in themselves, but which cannot be indulged in without interfering with rival exercises of personal freedom by others. One must give way to the other, and questions immediately arise as to which is to prevail, and whether the diminution of either by the exercise of the rival freedom gives rise to a right of action. It is an exercise of a man’s personal freedom to shout and make a noise, and if nobody else is interfered with he may shout as loud and as often as he likes. But it is an exercise of another’s personal freedom to pass his time in peace and quiet. Each must submit in some degree to the other. The man who loves quiet must make some allowance for his neighbor’s freedom to shout. The shouting man must pay some respect to his neighbor’s peace, and if he goes beyond what is reasonable he commits an actionable wrong. Here and in many cases the test of whether that which in itself, and so far as its mere nature goes, is

had to be carefully considered: whether in what the defendant did, in order to procure the dismissal of the plaintiffs, he came within any of the rules which have been laid down in the cases quoted. Now, to my mind, he was guilty of in-

not unlawful, constitutes a cause of action or not, is degree. There are other cases in which the motive becomes the test. A man may write or speak to a person having a common interest in the subject-matter of the communication with the utmost freedom about another man, and may say things most damaging to that other, so long as he does it honestly. But if he makes the opportunity the cloak for spite and ill will he creates a cause of action. A man may prosecute another, even without reasonable cause, so long as he does it honestly, and no action will lie against him. Let him do it out of spite or from a discreditable motive, and he is liable. The thing he does is in each case the same, so far as the very thing is concerned of which complaint is made, and its consequences to the sufferer are the same. But if it be done honestly there is no action; if it be done dishonestly or out of spite there is an action. The notion, therefore, that the same thing may be unlawful or may be lawful, may or may not constitute a cause of action, according as it is or is not done out of spite and ill will, or from some improper motive, is very well known to our law. There seems to be on principle no difficulty or impropriety in applying it to the present case. Surely, to do your best to take away another man's bread, and to succeed in doing so, may very well be a cause of action, if it be done out of pure spite and to punish a rival for having competed with you and your friends for work which he has as good a right as yourself or they to secure; whereas, if it be done fairly and honestly in the exercise of legitimate competi-

tion and without the intention of injuring a particular individual, except in so far as he may necessarily be injured by the course of conduct adopted for reasons not involving the desire to punish and distress him." *Id.*, p. 143.

Grantham, J., said: "This right to work as he likes is as much a personal right of the individual as is his right not to be molested in his person or property. It is a right of personal liberty. No one would deny that it would be illegal to forcibly prevent him from working in his garden; why is it not illegal, therefore, by a wrongful—that is, malicious—act to prevent him from working for hire for some one else who wishes to employ him in his garden? It is not contended on behalf of the plaintiffs that all malicious conduct on the part of a third person which is injurious to another is actionable, nor that the mere inducement of another to break his contract or engagement would of itself without malice be actionable, but it is contended that malicious conduct is actionable when it is a direct interference with a right of the person injured, and not merely a malicious exercise of a right of the person guilty of malice. In other words, can it be said our law is such that, it being admitted that the foundation of capital is labor, you will protect capital and the employment of capital, but will decline to protect that labor which creates it? There is, it must be remembered, a great difference between so managing your own business to make a profit for yourself that you indirectly cause loss to another, and the directly injuring another that profit may ac-

timidation, and coercion from that intimidation — though in using that phrase ‘of intimidation’ I am not using it in the technical sense which the statutes upon the subject have been construed to mean. I will explain in what sense I do understand the words; but in passing I must deprecate the language which has been used to minimize the effect of what Allen said. I observe it is described as ‘inconvenience.’ That is not how it is described by the witness. Edmonds, the foreman of the Glengall Company, thus described what would have been the effect upon the business of the firm. He said: ‘They were rather busy just then with the boiler-makers; that they employed three times as many boiler-makers as shipwrights; and if the boiler-makers had knocked off work or struck, it would have stopped the business of the company altogether — entirely — at that time, and that it was a very serious matter to the firm, and that the discharge of the men was in order to prevent their having to stop their business.’ It seems to me very obvious to ask whether the threat to do that which will have such an effect as the witness described is a coercion of the will or not.”¹

crue to yourself. In my judgment, therefore, the inducing the plaintiffs’ employers to discharge them by threats of injury to those employers if they did not discharge them was a good cause of action, because it was done maliciously, and that there was ample evidence of malice surely no one can doubt.” *Id.*, p. 148.

¹ As to the extent of the intimidation the lord chancellor said: “I have not used the word ‘intimidated,’ because I observe the learned judge says there was no intimidation in a legal sense. If what was meant by that was that there was no threat of violence to person or property, it is true; but the word ‘intimidate’ is not always to be construed as it has been construed under 6 Geo. 4, ch. 129. The construction of it in that statute flowed from other words with which the word ‘intimidate’ is associated; and if, instead of the word ‘intimidate,’ that which was held out as the inducement to dismiss the plaintiffs

was that such a stoppage of the works should be occasioned as that the business of the company would seriously suffer, I should think that would be a thing which would be likely to produce fear from the consequences of the company retaining them in their employment, and a company which abstained from doing so by reason of that fear would justly be described as intimidated. But the objection made by the defendants appears to be that the word ‘malicious’ adds nothing; that if the thing was lawful it was lawful absolutely; if it was not lawful it was unlawful — the addition of the word ‘malicious’ can make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may become lawful or unlawful according to the circumstances.” *Id.*, p. 163.

§ 490. On the question of motive the lord chancellor said: "In a decision of this house it has undoubtedly been held that, whatever a man's motive may be, he may dig into his own land and divert subterranean water which but for his so treating his own land might have reached his neighbor's land. But that is because the neighbor had no right to the flow of the subterranean water in that direction, and he had an absolute right to do what he would with his own property. But what analogy has such a case with the intentional inflicting of injury upon another person's property, reputation or lawful occupation? To dig into one's own land under the circumstances stated requires no cause or excuse. A man may act from mere caprice, but his right on his own land is absolute, so long as he does not interfere with the rights of others. But referring to Lord Justice Bowen's observation, which to my mind is exactly accurate, in order to justify the intentional doing of 'that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade,' you must have some just cause or excuse. Now the word 'malicious' appears to me to negative just cause or excuse, and without attempting an exhaustive exposition of the word itself, it appears to me that if I apply the language of Lord Justice Bowen, it is enough to show that this was within the meaning of the law 'malicious.' It appears to me there is no better illustration of the distinction on which I am insisting between an act which can be legally done and an act which cannot be so done, because tainted with malice, than such a colloquy between the representative of the master and the representative of the men as might have been held on the occasion which has given rise to this action. If the representative of the men had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did."

§ 491. On the element of conspiracy the lord chancellor said: "I turn now to the course of the trial, which is important in more ways than one. It is manifest that both the form of the statement of claim and the evidence directed at the trial were intended to raise the question of the right of the Boiler-makers' Union to use what I will call their union for the combined action against the individual plaintiffs, who belonged to another union. The plaintiffs apparently proceeded upon the assumption that what was represented to them as having been said by Allen was said in his character of delegate and of speaking with the authority of the Boiler-makers' Union, and accordingly the general secretary of this trades union and the chairman at the time of these transactions were both joined as defendants. Had they adopted or had they been proved to authorize the course taken by Allen, a question would have arisen whether or not they were all three parties to a conspiracy. Whether that charge could have been maintained against them or not I at present desire to say nothing. Such a question may arise again, and I wish to keep myself free to consider that question when it arises. But the chairman and the secretary of the union absolutely disclaimed any general or specific authority on the part of Allen either to threaten the employers or to withdraw the men. As to specific authority, the chairman proved that he had never heard of the dispute until he was served with the writ in the action. He says in terms that he never gave any authority to Mr. Allen to threaten employers to withdraw men from the work, and to do any such thing he regarded as a very serious matter for any delegate to take upon himself; and so far from adopting what Allen is sworn to have said — that the union would hunt the two men out of every employment where they were known to be, because they had once worked on an iron ship — he emphatically denies the right of his union to do anything of the sort; he says in terms, 'Providing that the shipwright, after being at the iron-work, started in some other place, for instance — then I would say we have no right whatever to interfere with him, unless we were then beginning iron-work again. If he started at wood-work, we would not interfere with him in any other place.' The learned counsel then puts a question to him (I think somewhat under a misapprehension as to what the learned

judge himself meant by a question he put), ‘ You say that may depend on circumstances?’ And his answer is, ‘ I do not say they would be in that instance, because in no instance have I ever known men interfering with him when he went to some other works and started his own particular work.’ I think it is only just to the Boiler-makers’ Union to point out how emphatically and distinctly their authorized officers (chairman and general secretary) disclaimed any such practice or principle as that which Allen has sworn to have attributed to them, and accordingly no imputation or liability could properly be attributed to the Boiler-makers’ Union or their authorized officers; but does that relieve Allen from the consequences of what he did? If concerted, collective action to enforce, by ruining the men’s employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that the action of an individual, who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats,—so that if they in truth authorize him, he and they might all have been responsible, while the false statements that he made, though acting upon the employer by the same pressure because it was believed, and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false.”

In conclusion the lord chancellor said: “ I regret that I am compelled to differ so widely with some of your lordships, but my difference is founded on the belief that in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished judges, going back now for nearly two hundred years, and that up to the period when this case reached your lordships’ house there was an unanimous consen-

sus of opinion; and that of eight judges who have given us the benefit of their opinions, six have concurred in the judgments which your lordships are now asked to overrule.”

§ 492. Lord Watson said, regarding the element of malice as constituting a cause of action: “Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly, and with a view to its injurious consequences, may, in the sense of law, be malicious, but such malice derives its essential character from the circumstance that the act done constitutes a violation of law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual, who is within the scope of these considerations, consists in this: that he may with immunity commit an act which is a legal wrong, and but for his privilege would afford a good cause of action against him; all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it, and still less that an act in itself lawful is converted into a legal wrong if it was done from

a bad motive." And further on Lord Watson said: "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly, and for his own ends, induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye*,¹ the inducer may be liable, if he can be shown to have procured his object by the use of illegal means directed against that third party." And again: "It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree to continue to work. It may be deplorable that feelings of rivalry between different associations of workmen should ever run so high as to make members of one union seriously object to continue their labor in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views. That the boiler-makers who were employed at the Regent Dock, Millwall, did seriously resent the presence among them of the respondents, very plainly appears from the evidence of the respondents themselves; and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact in the case. They were not under any continuing engagement to their employers, and, if they had left their work and gone out on strike, they would have been acting within their right, whatever might be thought of the propriety of the proceeding. Not only so, they were, in my opinion, entitled to inform the Glengall Iron Company of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or, as they preferred, by the appellant as their representative. If the workmen had made the communication themselves, and had been influenced by bad motives towards the respondents, then, according to the law which had been generally accepted by the courts below, they would each and all

¹ 22 L. J. Q. B. 463, 2 E. & B. 216, 247.

of them have incurred responsibility to the respondents. But it was clearly for the benefit of the employers that they should know what would be the result of their retaining in their service men to whom the majority of their workmen objected; and the giving of such information did not, in my opinion, amount to coercion of the employers, who were in no proper sense coerced, but merely followed the course which they thought would be most conducive to their own interest." Again: "The doctrine laid down by the court of appeal in this case and in *Temperton v. Russell*,¹ with regard to the efficacy of evil motives in making — to use the words of Lord Esher — 'that unlawful which would otherwise be lawful,' is stated in wide and comprehensive terms; but the majority of the consulted judges who approve of the doctrine have only dealt with it as applying to cases of interference with a man's trade or employment. Even in that more limited application it would lead, in some cases, to singular results. One who committed an act not in itself illegal, but attended with consequences detrimental to several persons, would incur liability to those of them whom it was proved that he intended to injure, and the rest of them would have no remedy. A master who dismissed a servant engaged from day to day, or whose contract of service had expired, and declined to give him further employment because he disliked the man and desired to punish him, would be liable in an action for tort. And, *ex pari ratione*, a servant would be liable in damages to a master whom he disliked, if he left his situation at the expiry of his engagement, and declined to be re-engaged, with the knowledge and with the intent that the master would be put to considerable inconvenience, expense and loss before he could provide a substitute. If that be the state of the law, it is somewhat remarkable that there is no case to be found in the books of any such action having been sustained."

§ 493. Lord Herschell in the course of his opinion said: "If the judgment under appeal is to stand, and the fact that the act procured was unlawful as being a breach of contract be immaterial, it follows that every person who persuades another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself

¹ 62 L. J. Q. B. 412, (1893) 1 Q. B. 715.

at the expense of such person. Such a case is within the very words employed in *Bowen v. Hall*,¹ as applied to the present judgment. I do not think it possible to maintain such a proposition. It would obviously apply where one trader induced another not to contract with a third person with whom he was in negotiation, but to make the contract with himself instead — a proceeding which occurs every day, and the legitimacy of which no one would question. Yet it is within the very language used in *Bowen v. Hall*. He induces a person not to enter into a contract with a third person, and his object is to benefit himself at the expense of the person who would otherwise have obtained the contract, and thus necessarily to injure him by depriving him of it. It was said at the bar by the learned counsel for the respondents, in answer to this difficulty, that there was an exception in favor of trade competition. I know of no ground for saying that such an exercise of individual right is treated with exceptional favor by the law. I shall revert to this point presently in connection with another branch of the respondents' argument. But it is possible to give many illustrations to which no such answer would apply. I give one. A land-owner persuades another to sell him a piece of land for which a neighbor is negotiating. It is so situated that it will improve the value of the property of whichever of them obtains it. His motive, is to benefit himself at his neighbor's expense; he induces the owner of the land not to contract with his neighbor. The case is within the terms of the judgment in *Bowen v. Hall*. Would it be possible to contend that an action lay in such a case? If the fact be that malice is the gist of the action for inducing or procuring an act to be done to the prejudice of another, and not that the act induced or procured is an unlawful one as being a breach of contract or otherwise, I can see no possible ground for confining the action to cases in which the thing induced is the not entering into a contract. It seems to me that it must equally lie in the case of every lawful act which one man induces another to do where his purpose is to injure his neighbor or to benefit himself at his expense. I cannot hold that such a proposition is tenable, and no authority is to be found for it. I should be the last to suggest that the fact that

¹ 50 L. J. Q. B. 305, 6 Q. B. D. 333.

there was no precedent was in all cases conclusive against the right to maintain an action. It is the function of the courts to apply established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbor or of benefiting oneself at his expense is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do or to refrain from doing particular acts. The fact that under such circumstances no authority for an action founded on these elements has been discovered does not go far to show that such an action cannot be maintained. I think these considerations (subject to a point which I will presently discuss) are sufficient to show that the present action cannot be maintained."

§ 494. In continuing, Lord Herschell said: "I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that every one has a right to pursue his trade or employment without 'molestation' or 'obstruction,' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment and needs to be excused or justified, I say that such a proposition, in my opinion, has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection, as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with some one else in his calling? In the course of the argument one of your lordship's asked the learned counsel for the

respondents whether, if a butler, on account of a quarrel with the cook, told his master that he would quit his service if the cook remained in it, and the master preferring to keep the butler terminated his contract with the cook, the latter could maintain an action against the butler. One of the learned judges answers this question without hesitation in the affirmative. As in his opinion the present action would lie, I think he was logical in giving this answer. But why, I ask, was not the butler in the supposed case entitled to make his continuing in the employment conditional on the cook ceasing to be employed? And, if so, why was he not entitled to state the terms on which alone he would remain, and thus give the employer his choice? Suppose, after the quarrel, each of the servants made the termination of the contract with the other a condition of remaining in the master's service, and he chose to retain one of them, would this choice of his give the one parted with a good cause of action against the other? In my opinion a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful and thus to require justification."

§ 495. Lord Macnaghten said: "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do, or to abstain from doing, at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the acts or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct, if it could be inquired into, was without justification or excuse. The case may be different where the act itself, to which the loss is traceable, involves some breach of contract or some breach of duty and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point."

§ 496. The importance of *Allen v. Flood*.—The importance of the case is thus stated by Lord Morris: "If this was an ordinary case I should be satisfied by merely expressing my concurrence in the able and exhaustive judgment of the lord chancellor, which deals so fully both with the law and the facts of the case; but as the judgment of this house about to be pronounced overturns, as I consider, the overwhelming judicial opinion of England, I feel bound to state shortly my views without reiterating the common facts of the case or going into the evidence in detail, as both have already been so often repeated."

§ 497. Fundamental assumptions underlying the proposition that the evidence disclosed a cause of action.—The opinions of the judges who held that the evidence disclosed a cause of action were based largely upon the following fundamental propositions:

1. Every wrong involves the violation or disturbance of some right; and, conversely, every right is protected from violence or disturbance by its appropriate action.

2. "Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."¹

3. "Intimidation, obstruction and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence; the obstruction of actors on the

¹ Quoted with approval from Erle on the Law of Trades Unions, published in 1869, p. 12.

stage by preconcerted hissing; the disturbance of wild fowl in decoys by the firing of guns; the impeding or threatening servants or workmen; the inducing persons under personal contracts to break their contracts,—all are instances of such forbidden acts.”¹

§ 498. Fundamental assumptions underlying the proposition that the evidence disclosed no cause of action.—The opinions of the judges who held that the evidence did not disclose a cause of action were based largely upon the following propositions:

1. Malice alone never constitutes a cause of action, or, in other words, does not make that a wrong which otherwise would not be a wrong.

2. “Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due.”

3. Inasmuch as there was no continuing contract of employment, the Glengall Company had the legal right to discharge the plaintiffs; the incentives to the act were therefore immaterial. If an employer has the legal right to discharge an employee, a party who persuades him, or even intimidates or coerces him into discharging the employee, is not liable for damages sustained by the servant, unless the intimidation or coercion is by unlawful means.²

¹ Quoted with approval from opinion of Bowen, L. J., in *Mogul S. S. Co. Case* (58 L. J. Q. B. 465, 480, 486, 23 Q. B. D. 614, 626). In support of the instances of such forbidden acts Lord Bowen cited *Tarleton v. McGawley*, 1 Peake N. P. 270; *Clifford v. Brandon*, 2 Campb. 358; *Gregory v. Brunswick*, 13 L. J. C. P. 34, 36, 6 Man. & G. 205; *Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringill*, 11 East, 573, n., 11 Mod. 74, 130, 3 Salk. 9; *Garret v. Taylor*, Cro. Jac.

567; *Bowen v. Hall*, 50 L. J. Q. B. 305, 6 Q. B. D. 333; *Lumley v. Gye*, 22 L. J. Q. B. 463, 2 E. & B. 216, 247.

² “Assuming that the Glengall Iron Company, in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. Accord-

4. The coercion or intimidation, whatever its nature, in order to involve the party exercising it in legal liability for damages occasioned thereby, must be intrinsically, and irrespective of its motive, a wrongful act. It is obvious from even a brief consideration of the foregoing considerations that the differences in conclusions reached by different judges, based upon the propositions outlined, must be to a certain extent differences in the understanding and use of terms.¹

ing to the decision of the majority in *Lumley v. Gye*, 22 L. J. Q. B. 463, 2 E. & B. 216, 247, already referred to, a person who by illegal means—that is, means which in themselves are in the nature of civil wrongs—procures the lawful act of another, which act is calculated to injure and does injure a third party, commits a wrong for which he may be made answerable. So long as the word ‘means’ is understood in its natural and proper sense, that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him.” From opinion of Lord Watson.

¹ Concerning the effect of this decision a writer in 11 *Harvard Law Review*, page 405, says: “There is a view, more or less clearly set forth in the opinions of many judges and the writings of many legal authors, in both England and this country, that when a plaintiff has proved that the defendant has intentionally caused him to suffer pecuniary damage, he has shown a good cause of action, unless the defendant shows some ground of justification. A broad general privilege of every person to conduct his affairs as he chooses, and in particular to manage his business in whatever way seems most profitable, is considered to furnish sufficient justification in almost all cases where the defendant has not made use of

fraud, violence or other means conceded to be illegal apart from the motives by which it may be directed. Where the question of the defendant’s responsibility for his acts has been approached in this manner, however, it has almost always been declared, either by implication or by direct words, that this justification would not extend to cases where mere personal spite, or other wholly improper considerations, furnished the sole or predominant motives for the defendant’s act. The presence of this gap in the whole range of acts of intentional infliction of damage, between the class of acts which are unlawful without regard to motive and those which are, in point of law, wholly justifiable and lawful, is what gives practical importance to this whole view of the theory of the law of torts. That there was such a gap was expressly stated not only by the court of appeal in the case under discussion, *Flood v. Jackson* (1895), 2 Q. B. 21, and in *Temperton v. Russell* (1893), 1 Q. B. 715, but also by several of the judges and law lords in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, (1892) App. Cas. 25, where the decision upon the facts of the case was in favor of the defendant. And the existence of such a gap has been assumed, if not expressly asserted, in a great number of American cases, extending from *Walker v. Cronin*, 107 Mass. 555, to the very recent case of *Oxley Stave Co. v. Hoskins* (see 56 Alb. Law Jour. 400). Now the decis-

§ 499. **Comment upon Allen v. Flood.**—The conclusion reached by the majority in the House of Lords, in *Allen v. Flood*, is not in accordance with the propositions hereinbefore outlined concerning the liability of a single defendant in cases embraced in the third category (see § 469). Too much stress was laid upon the abstract proposition that “malice alone never constitutes a cause of action and does not make that a wrong which otherwise would not be a wrong.” Under the views hereinbefore outlined neither malice nor the motive of the defendant in *Allen v. Flood* was of so much importance as his conduct, considered in connection with his own legal rights and occupation and in connection with the legal rights and occupation of the two injured employees. If the defendant Allen, for the legitimate advancement of his own legitimate business, or in the exercise of some well-recognized personal privilege, had inflicted exactly the same injury upon the two employees, no cause of action would arise, and the disposition of Allen toward the employees would be entirely immaterial. He might be actuated by feelings of dislike and malice, and he might desire to injure the two employees far more than he desired to advance his own legitimate business; but if in injuring the employees, and thereby gratifying his malice toward them, he at the same time was legitimately advancing some

ion in *Allen v. Flood* seems to cut in back of the whole modern theory just stated, and render all discussions of what constitutes justification or privilege, outside of the cases of recognized affirmative defenses, of little practical value. The majority distinctly lay down the proposition that an act which is not in itself unlawful apart from the motive of the person doing it, as falling within some of the ancient and tolerably well defined classes of wrongful acts, cannot render a man liable to an action at law, however bad the motives on which he may have acted, and however serious the loss he may succeed in inflicting upon others. The existence of the gap above referred to, which admits of some acts being considered tortious on account of the bad motive accompanying them, is

altogether denied. It may be maintained, of course, that this amounts to saying that the privilege of doing as one chooses sweeps back to the boundaries of fraud and violence. The court, however, do not so treat the question; they do not go into any question of justification because they recognize no *prima facie* wrong. That this doctrine of *Allen v. Flood* is simple, convenient in practice, and in accord with a conservative view of the spirit of the common law, seems almost undeniable; though many will argue that it impairs the invaluable elasticity of the common law, and will keep out of the courts many cases in which the conditions of modern society demand judicial interference, even though such interference may in some respects appear difficult and dangerous.”

legitimate business of his own, then the case would fall under category 2, and no cause of action would lie, no matter how serious the resulting damages.

If, however, it appears as a matter of fact that the course pursued by Allen was not connected directly or indirectly with the legitimate prosecution of any legitimate business of his own, or with the exercise of any well-recognized personal privilege, but was directed entirely against the rights of the plaintiffs to exercise a legitimate calling, then the case falls under category 3, and a cause of action arises even though it should also appear that the defendant had, as a matter of fact, no personal ill-will toward the plaintiffs and was not actuated by malice.

In short, the question involved in a case such as *Allen v. Flood* is not necessarily an investigation into the existence of malice or an inquisitorial inquiry into a man's personal feelings and motives, but it is rather — and in this respect it is like all cases of torts — an inquiry into conduct and the results of conduct; in other words, an inquiry into matters of fact. In a case where it appears that a defendant has interfered with the legitimate pursuits of the plaintiff, and thereby damaged the plaintiff, it is no defense for the defendant to show that he was not actuated by malicious motives, if it appears that his acts which occasioned the damage were of a wanton, idle or useless character, that they were not connected directly or indirectly with the advancement of any legitimate pursuit of his own or with the exercise of any well-recognized personal privilege, but were done with the knowledge, either express or implied, that the necessary consequences must be the damage of the plaintiff. Nor, in cases similar to *Allen v. Flood*, will it aggravate the plaintiff's damages to show that defendant was actuated by malicious motives. The damages resulting from the conduct of the defendant remained the same regardless of his motives, and the acts constituting the conduct of the defendants remained the same regardless of his motives; and if a cause of action exists it is made up of the acts and the resulting damage. There are wrongs in the remedying of which the law takes cognizance of the motives involved and permits juries to swell the damages in proportion to the malice disclosed; and in such cases there may be direct proof of malicious intent on the part of the defendant or defendants; but in the view we take of the law governing cases similar to

Allen v. Flood it would be not only immaterial but improper to permit the introduction of evidence which tended simply to show the personal feeling or disposition of the defendant toward the plaintiff. If a witness offered to testify that he heard the defendant say that he disliked and hated the plaintiff, unless such conversation had some immediate connection with the conduct of the defendant which led up to the damage suffered by the plaintiff, the conversation would have no material bearing upon the issues involved; for if the conduct which occasioned the damage had no connection whatsoever with any legitimate advancement of any legitimate interest of the defendant or with any well-recognized personal privilege of the defendant, then the conduct is actionable, whether the defendant hated the plaintiff or not; whereas, if the conduct which occasioned the damage did have some connection with the legitimate advancement of the lawful occupation of the defendant or with some well-recognized personal privilege of the defendant, then it is not actionable, even though the defendant hated the plaintiff and wished to injure him. Furthermore, the introduction of such testimony as that last referred to would be incompetent for the reason that it cannot affect the question whether or not defendant's conduct is actionable, and it would make a very serious impression upon the minds of the jury and tend improperly to swell the verdict. Direct proof of the existence of malice should not be permitted where malice is neither the gist of the offense nor a recognized element in fixing the amount of damages.

§ 500. The element of conspiracy in *Allen v. Flood*.—It would certainly seem that counsel for plaintiffs in *Allen v. Flood* were not very astute in searching for the element of conspiracy which undoubtedly existed in that case. The defendant was the London delegate of the Boiler-makers' Union. The boiler-makers in the employ of the Glengall Company objected to the retention of the two plaintiffs, and these boiler-makers were talking among themselves about striking in order to compel the discharge of the plaintiffs. Defendant, as the London delegate, was appealed to, and came down to adjust matters. He persuaded the boiler-makers to wait until he could interview the employers. In his interview with the employers he explained the situation, and in fact threatened that the boiler-makers would strike unless the plaintiffs were discharged.

Whether the foregoing is an absolutely exact summary of the case or not, it is entirely clear that the defendant, Allen, did not act entirely upon his own responsibility. While the officers of the union who were at first joined with him as defendants denied that he had any authority to make the threats and statements that he did make to the officers of the Glengall Company, still, the evidence clearly showed that the threats made by Allen were by no means idle and ineffectual. Whether the particular officers of the Boiler-makers' Union who were at first joined with Allen authorized him to make the representations was immaterial except so far as those particular defendants were concerned; the fact remained that he was there as the representative of the union and as spokesman of the boiler-makers employed by the Glengall Company, and a very little investigation would have shown that in making those threats and statements to the officers of the Glengall Company he was acting as the mouth-piece of others, and as the spokesman of a combination the immediate object of which was to compel the discharge of the plaintiffs by threats of inflicting great damage upon the plaintiffs' employers. If there were no combination of any kind back of the defendant Allen, then his threats were utterly idle. It was only the existence of the powerful combination of boiler-makers and Allen's connection with that union which made his threats and statements of any force or effect whatsoever. Even if Allen were not acting in connection with the other officers of the union who were joined with him as defendants, he was certainly acting with the dissatisfied boiler-makers in the employ of the Glengall Company, for they were awaiting the result of his interview with their employers, and it was with their approval that he was notifying their employers that they would strike unless the plaintiffs were discharged. It would certainly seem as though counsel with a little more diligence could have ascertained the names of some of the parties to the conspiracy, the power of which was to be exerted against the company in the event of its refusal to discharge the objectionable employees.¹

§ 501. *Huttly v. Simmons et al.* (1897).² — In this case "the plaintiff, a cab-driver, sued the defendant Simmons, who was the president of the strike committee of a trade union, and

¹ Compare *Leathem v. Craig* (1899), 33 Ir. Law Times R. 85. ² 67 L. J. R. Q. B. D. 213.

three others, who were members of the same trade union, for damages sustained by the plaintiff in consequence of the defendants having induced a cab proprietor named Young to refuse to engage the plaintiff to drive a cab for him, or to let a cab to the plaintiff to be so driven. The statement of claim alleged that the defendants acted maliciously in this respect, and also that they conspired together with others to induce Young not to employ the plaintiff, nor to permit him to hire or drive a cab. The learned judge directed the jury that there was no evidence against any of the defendants except Simmons; that there was no evidence of a contract between plaintiff and Young or any other person to employ the plaintiff to drive a cab or let a cab on hire to plaintiff; that there was no evidence that the defendant Simmons did anything to prevent any other person than Young from employing plaintiff. In answer to questions left to them, the jury found as follows: (1) Did the defendant Simmons induce Young not to engage plaintiff to drive a cab for him, or to let on hire to plaintiff a cab to be so driven? Answer. Yes. (2) If so, did the defendant Simmons do this maliciously in this sense? Did he induce Young to refuse to employ plaintiff or to let a cab on hire to him for either of the following reasons: (a) In order to injure plaintiff? Answer. Yes. (b) Or to procure some indirect advantage for himself, the defendant? Answer. No. (c) Or to procure such advantage for others for whom defendant was acting? Answer. Yes. (3) Did the defendant Simmons conspire with others—with other members of the cab-drivers' union, for example,—to induce Young not to employ the plaintiff nor to permit him to hire and drive a cab? Answer. Yes; and the jury assessed the damages at 5*l*. Upon these findings judgment was entered for the defendants Groh, Thorpe and Everett. With regard to the defendant Simmons judgment was reserved, having regard to the fact that the case must depend, except as to the finding on the question of conspiracy, upon the decision of the House of Lords in the case of *Allen v. Flood* (1897, 67 L. J. R. Q. B. D. 119), which was then awaiting judgment on appeal to the House of Lords from the judgment of the court of appeals."

In rendering judgment for the defendant in this case, Darling, J., held that he was bound by the decision of the House of Lords in *Allen v. Flood*.¹

¹ *Supra*.

§ 502. Upon the question of conspiracy the learned judge said that the judgment in *Allen v. Flood* was of no authority, since there was no question of conspiracy directly involved in that case, and he proceeds: "Now I take it to have been established by the judgment of the House of Lords in *Allen v. Flood*, that, conspiracy apart, nothing proved to have been done by the defendant in this case amounted to an actionable wrong. Does, then, his having conspired with others to do those things render such otherwise innocent acts illegal and wrongful, so as to give plaintiff a right of action against him? I think I am bound by authority to come to a contrary conclusion. In the case of *Reg. v. Warburton*¹ Chief Justice Cockburn, delivering the judgment of the court, says: 'It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretenses to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful—that is, amount to a civil wrong.' From the statement of the court that it is enough if these acts do amount to a civil wrong, it is to be inferred that there would be no illegal conspiracy did those acts not amount to a civil wrong at the least. Now it is true that the judgment there was pronounced in a criminal case; but in the well-known case of *Mogul Steamship Co. v. McGregor, Gow & Co.*,² Lord Coleridge, C. J., speaks thus: 'It cannot be, nor indeed was it, denied that in order to found this action there must be an element of unlawfulness in the combination on which it is founded, and that this element of unlawfulness must exist alike whether the combination is the subject of an indictment or the subject of an action.' The question is, moreover, to my mind, concluded by the very learned and altogether admirable judgment of Chief Baron Palles in *Kearney v. Lloyd*,³ which is to the effect that conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff. In this case it appears to me that I am bound by the decision

¹ (1870) 40 L. J. M. C. 22; L. R. 1 C. C. R. 274, at p. 276.

² (1888) 57 L. J. Q. B. 541; 21 Q. B. D. 544, at p. 549.

³ (1890) 26 L. R. Ir. 268.

of the House of Lords to hold that none of the acts done or agreed to be done gave the plaintiff any right of action for injury in law to any legal right of his, and therefore my judgment must be for the defendant."

§ 503. If this decision be sound there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial and the entire law of civil conspiracy is a superfluous discussion. Under that proposition the element of confederating may be entirely ignored, since the wrongful act and the damages occasioned thereby are the only elements with which the law need have any concern. Under such a condition of things the well-known rule making one or all of the guilty parties liable for all the damages occasioned by a tort would govern, and there need be no reference whatsoever either in the pleadings or upon the trial to any combination or conspiracy.

But, notwithstanding the decision in *Huttly v. Simmons*, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action.

§ 504. **The intimidation or coercion must be of a substantial character.**—In order to enable a discharged employee to recover damages from third parties who occasioned the discharge by coercing or intimidating the employer, the coercion or the intimidation must be of a substantial and effective character, and the character of the coercion or intimidation would be a question of fact for a jury.¹

¹ In *Reg. v. Rowlands et al.* (1851), 5 Cox, C. C. 436, Erle, J., charged the jury as follows regarding the nature and extent of the intimidation exercised upon the employer: "I think, with respect to any intimidation to Mr. Perry, there does not seem to be anything like a direct threat of personal violence, or anything like a di-

rect threat of actual violence to his property; but if a powerful body intimate that his lawful freedom of action will be interfered with unless he consents to certain terms, it will be for you to consider whether he might not be reasonably said to be intimidated if such matters occurred to him." . . . "If a man says that

It is not every threat which will give rise to a cause of action. An employer dependent upon the services of a very skilful foreman, or even a very skilful workman, might very quickly consent to discharge a number of less valued employees

an event will happen, and it does afterwards happen, it is for the jury to consider whether the man who says it may happen did not know the way to bring that event about, and whether, if it did afterwards happen, he had not a concern in bringing it about. With regard to the letter of the 2d of April, it used the word 'mediator,' and said the parties were to call in the perfect hope that they were to be taken 'purely as mediators, and not as presuming to visit you in an offensive spirit of dictation.' But then the effect on a man's mind of the expression, saying, 'We do not come in an offensive spirit of dictation,' after notice of the power of the body, and what they could do, was certain to call up in the mind of a man the feeling that these were persons who had the power, and might exercise it. When the book of prices was pressed on Mr. Perry, he said he would consider it, and did not give a direct answer as to its adoption; and if a man does not venture to speak his mind, what is the reason why he does not? It is because he is apprehensive some evil consequence will arise and he is in fear from that evil consequence." In the same case the court *en banc*, in pronouncing sentence, said on page 493: "But it does not appear, certainly, by the evidence that any words of express threats were used by any one of the persons I think that are implicated in this case, nor any words of express intimidation. But no man can fail to see that there may be threats, and there may be intimidation, and there may be molesting, and there may be obstructing, which the jury are quite satisfied have taken place from all

the evidence in the case, without there being any express words used by which a man should show any violent threats towards another, or any express intimidation. There are these facts, however, disclosed in the early part of the evidence, that you, Frederick Green, I think, being a delegate from London, on complaint being made in respect to some person who had been discharged from the employment of Mr. Perry, you wanting to know if it was because he was a member of some association, were told he was discharged because his employers had no occasion for his services, and you said: 'If he was discharged because he was a member of an association, we have twenty thousand pounds at our command, we will stop the supplies, and you shall not have a single hand to do your work.' How far it can be doubted that that might intimidate even a man of strong nerve, who had a great deal of work which he wanted done, and who knew and was told of the great power this association had, it was for the jury to determine; and I cannot say there may not have been great intimidation operating on the mind of Mr. Perry, from the language then used, although there was no express statement to that effect. And so again, with respect to that placard which was afterwards issued, signed by William Peel. Without going into all the language of that placard, no person can possibly read that without seeing that it contains very violent and inflammatory language; abusing very much the conduct of the masters, finding great fault with them, and as being persons who ought to be resisted and coerced in

upon the threat of the foreman or skilful workman to leave unless he dismissed the others. A cause of action would not arise under such circumstances. Every employee who is not bound by a contract for a period may leave at his discretion,

every way, and crying up the conduct of the workmen, and of the persons to whom it was addressed, as being temperate in every respect. . . . I say that there cannot be any doubt that there was evidence from which the jury might fairly draw the conclusion that the intention was to molest, intimidate and obstruct."

In *Wood v. Bowron* (1866), 2 L. R. Q. B. 21, the court quashed an indictment, Chief Justice Cockburn saying on the subject of intimidation: "It is most important, therefore, to look at the facts, in order to ascertain whether there was a threat or intimidation such as is the subject-matter of the conviction. It seems that certain members of the association, of which the appellants are respectively chairman and secretary, were in the employment of Mr. Bowron, the respondent. On a certain day, without notice to him, certain of his workmen, having been seen in conversation with the appellant Barrow, suddenly leave his service, no threat at the time being made to the master. The men having left, he inquires of Barrow why the men left. Barrow simply says: 'You must know that it was in consequence of your apprentices.' In that I can find no threat on the part of Barrow, still less a threat by Wood. The master is the next person who moves in the matter. There is no communication made to him spontaneously by the association; the resolution bears no semblance of an intention to intimidate him by means of a threat; but the master himself, not only for the purpose of ascertaining what was the cause for which the men had with-

drawn from his employment, but evidently for the purpose of entering, if possible, into an arrangement with the society, puts himself in motion, and writes to ask what are the reasons and the grounds for which these men are withdrawn. Upon that a letter is written by Barrow at a meeting, at which it appears the appellant Wood presided, for which letter, therefore, I think, if it amounted to a threat, Wood would have been responsible. The letter, however, which Barrow writes, upon the face of it appears to be merely an explanation of how it came to pass that these men had left the respondent's employment. Now, inasmuch as it is not for the combination, as it is not for the resolution, as it is not for what may have been done under the resolution, either by the society or by the men leaving, that this information was laid or this conviction has been obtained, but for a threat, we must see whether the letter written under the circumstances I have adverted to amounts to a threat. I think it does not. If there had been anything to show that the letter purporting to afford an explanation by way of answer to a question put by the employer had been intended really to convey a threat, and the magistrates had come to that conclusion, and said: 'We think that the defendants have, under the guise of an explanation, conveyed that which was intended to be a threat,' that would have been another matter. I must say I do not think there is enough to warrant this inference under the circumstances, seeing that the master himself invited the explanation. The appellants merely

and if he does not like his fellow-workmen he may assign such dislike as a cause of his leaving; and he may give his employer a choice of retaining himself or the employees he dislikes. The right to quit a service being a legal right, no cause of action results from the threat of an individual to exercise that legal right.¹

told him what had been the cause of the withdrawal of the men, and I think that does not amount to a threat within the terms of the act of parliament. Upon that ground I think that the conviction cannot be sustained." In this connection Shee, J., said: "A threat must be an intimation made with the intention of forcing or unduly influencing the conduct of persons to whom it is addressed."

¹ In the course of his opinion in *Allen v. Flood*, 67 L. J. R. (Q. B.) 119, at page 137, Cave, J., said: "It was asked by one of your lordships, 'If a cook says to her master, Discharge the butler or I leave you, is that actionable?' With submission I say that it is, if the master does discharge the butler in consequence; and I hardly understand why it should not be. *Ex concessis*, the butler has been interfered with in earning his livelihood, and has lost his situation, and the circumstances show no just cause or excuse why the cook should have induced her master to discharge the butler. The interference or disturbance is not violent, as if the cook had threatened to shoot her master if he did not discharge the butler at her request; but, no good cause or excuse being shown, though many may be suggested, it is malicious. Suppose the cook had falsely told her master that the butler did not know his business, and the master had discharged him in consequence of what she said, would not that be actionable? Or is an action of slander in his calling the luxury of a trader,

and not competent to a working-man?"

The reasoning of the learned judge is hardly sound. He might have escaped the corner into which it was sought to force him, by responding that the mere threat of a cook to leave, unless the butler was discharged, would not give the butler a right of action in case of his discharge, unless the situation of the parties and the circumstances were such that the threat of the cook amounted to a coercion of the employer (circumstances perhaps not entirely inconceivable in these days of autocratic cooks). Many a servant is discharged simply because an older servant expresses a dislike for the newer employee. Many a master and many a mistress are influenced by expressions of like and dislike from valued and trusted servants, and the discharge of a servant for such a reason would give no right of action against the servant who was the occasion of the discharge. It is quite otherwise if a number of servants should combine together and agree to leave in a body, thereby subjecting the master to inconvenience and loss, unless another servant is discharged. Such a combination would be a conspiracy to oppress and injure.

In *Walsby v. Anley* (1860), 7 Jur. N. S. 465, Crompton, J., said: "Any man may say to his master, 'It is my whim not to work with particular persons.' But then comes the question whether any number of persons may combine to procure the discharge of fellow-workmen by threat-

§ 505. Whatever the means used to intimidate or coerce the employer, it must clearly appear that they were used for the purpose of coercion and intimidation, and with the intent that the coercion and intimidation should become effective in the discharge of the employees. It is quite conceivable that a timid employer might be frightened, not to say intimidated, by the representative of a labor union simply appearing and discussing the situation, without expressing any desire that the objectionable employees be discharged; such employer might say with truth that he discharged the men because he had ascertained that they were objectionable to the union and he was afraid of the union, and it might be argued with some show of reason that the dismissal was occasioned by the interference of the representative of the union; it is even conceivable that a shrewd representative of a powerful union, who is somewhat familiar with the law upon the subject, might take this indirect and roundabout means of procuring the discharge of the objectionable employees. However, no cause of action would arise unless it appear to court and jury from the evidence that the pressure brought to bear either directly or indirectly upon the employer was for the purpose of occasioning the discharge of the employees.

§ 506. Wanton and malicious interference with the rights of others.—Combinations formed to intimidate employers or

ening that they will all leave in a body if those workmen are not discharged. It is a well-known rule of law that one man may do what may not be done by a number of persons combined, when it tends to the injury of another." And continuing he said: "The charge is that the appellant, with others, threatened their master that they would leave his employment, with the object of forcing him to discharge certain other workmen. That is clearly illegal upon the authority of *Reg. v. Rowlands*, 5 Cox, C. C. 466, 17 Q. B. 671, 6 Jur. 268, and *In re Parham*, 5 Jur. N. S. 1212, 1221, if the question had arisen on the evidence, whether that was the object was a question for the magistrate to decide, and I think that upon the

evidence his decision was right. The threat did not apply to persons coming into the employment of the master, if that could make any difference, but to persons in his employment; and the threat is that 'unless the men who are working under the declaration in his shop be discharged, and we have a definite answer by dinner-time to that effect, we will cease work immediately.' It is as clear as possible that this was threatening to carry out an illegal conspiracy of all who signed the document. That is prohibited by the common law, and not allowed by section 4 of Stat. 6 Geo. 4, ch. 129, the object being to alter the description of workmen who should continue in the employment of the master."

to coerce other workmen are unlawful whenever the design or the effect of such combination is to interfere with the rights or to control the free action of others. Each man has a right to be free from wanton, malicious and insolent interference, disturbance or annoyance; each man has a right to work for whom he pleases and for such wages as he can obtain, and he has the right to deal with and associate with whom he chooses. No man has the right, either alone or in combination with others, to intentionally or maliciously disturb, injure or obstruct another either, directly or indirectly, in his lawful pursuits or in his peace and security of life. Every combination the object of which is to attempt by force or threats or intimidation to control an employer in the determination as to whom he will employ or the wages he will pay is an unlawful conspiracy.¹

¹ *Crump v. Com.* (1888), 84 Va. 927; *Moore & Co. v. Bricklayers' Union et al.*, 23 Wkly. Law Bul. 48; *Casey v. Cin. Typographical Union et al.*, 45 Fed. R. 135; *Arthur v. Oakes et al.*, 63 Fed. R. 310; *Callan v. Wilson*, 127 U. S. 540; S. C., 8 Sup. Ct. 1301; *Com. v. Hunt*, 4 Met. 111; *United States v. Elliott et al.* (1894), 64 Fed. R. 27; *State v. Glidden et al.*, 55 Conn. 46, 75, 8 Atl. R. 890; *Murdock v. Walker* (1893), 152 Pa. St. 595, 25 Atl. R. 492; *Barr v. Essex Trades Council* (1894), 53 N. J. Eq. 101, 30 Atl. R. 881.

Mr. Justice Bradley in the *Slaughter-house Cases*, 16 Wall. 36, at page 116, said: "For the preservation, exercise and enjoyment of these rights (life, liberty and the pursuit of happiness), the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."

In his charge to the grand jury Judge Grosscup said:

"I recognize, however, the right of labor to organize. Each man in America is a freeman, and, so long as he does not interfere with the rights of others, has the right to do with that which is his what he pleases. In the highest sense, a man's arm is his own, and, aside from contract relations, no one but he can direct when it shall be raised to work, or shall be dropped to rest. The individual option to work or to quit is the imperishable right of a freeman. But the raising and dropping of the arm is the result of a will that resides in the brain, and, much as we may desire that such will should remain entirely independent, there is no mandate of law which prevents their association with others, and response to a higher will. The individual may feel himself, alone, unequal to cope with the conditions that confront him, or unable to comprehend the myriad of considerations that ought to control his conduct. He is entitled to the highest wage that the strategy of work or cessation from work may bring, and the limitations upon his intelli-

§ 507. Combination to coerce capital.—Combinations the object of which is to interfere with the freedom of employers in the proper management of their business, or to dictate terms upon which their business shall be conducted, by threats of in-

gence and opportunities may be such that he does not choose to stand upon his own perception of strategic or other conditions. His right to choose a leader, one who observes, thinks and wills for him,—a brain skilled to observe his interest,—is no greater pretension than that which is recognized in every other department of industry. So far, and within reasonable limits, associations of this character are not only not unlawful, but are, in my judgment, beneficial, when they do not restrain individual liberty, and are under enlightened and conscientious leadership.

“But they are subject to the same laws as other associations. The leaders to whom are given the vast power of judging and acting for the members are simply, in that respect, their trustees. Their conduct must be judged, like that of other trustees, by the extent of their lawful authority and the good faith with which they have executed it. No man, in his individual right, can lawfully demand and insist upon conduct by others which will lead to an injury to a third person's lawful rights. The railroads carrying the mails and interstate commerce have a right to the service of each of their employees until each lawfully chooses to quit; and any concerted action upon the part of others to demand or insist, under any effective penalty or threat, upon their quitting, to the injury of the mail service or the prompt transportation of interstate commerce, is a conspiracy, unless such demand or insistence is in pursuance of a lawful authority conferred upon them by the em-

ployees themselves, and is made in good faith in the execution of such authority. The demand and insistence under effective penalty or threat, and injury to the transportation of the mails or interstate commerce being proven, the burden falls upon those making the demand or insistence to show lawful authority and good faith in its execution.

“Let me illustrate: Twelve carpenters are engaged in building a house. Aside from contract regulations they each can quit at pleasure. A thirteenth and fourteenth man, strangers to them, by concerted threats of holding them up to public odium or private malice, induce them to quit and leave the house unfinished. The latter in no sense represent the former or their wishes, but are simply interlopers for mischief, and are guilty of conspiracy against the employers of the carpenters. But if upon a trial for such it results that instead of being strangers they are the trustees, agents or leaders of the twelve, with full power to determine for them whether their wage is such that they ought to continue or quit, and that they have in good faith determined that question, they are not then, so far as the law goes, conspirators. But if it should further appear that the supposed authority was used, not in the interests of the twelve, but to further a personal ambition or malice of the two, it would no longer justify their conduct. Doing a thing under cloak of authority is not doing it with authority. The injury of the two to the employer, in such an instance, would only be aggravated by their treachery to the associated twelve, and both

jury or loss, or by interference with their property or traffic, or with their lawful employment of other persons, or which are designed to abridge any of those rights, are illegal combinations.¹

It has been well said that "freedom of business action lies at the foundation of all commercial and industrial enterprises. Men are willing to embark capital, time and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them; if the courts cannot protect them from interference by those who are not interested with them; if the management of business is to be taken from the owner and assumed by, it may be, irresponsible strangers,—then we will have to come to the time when capital will seek after other than industrial chan-

the employer and employees should, with equal insistence, ask for the visitation of the law.

"If it appears to you, therefore, applying the illustration to the occurrences that will be brought to your attention, that any two or more persons, by concert, insisted or demanded, under effective penalties and threats, upon men quitting the employment of the railways, to the obstruction of the mails or interstate commerce, you may inquire whether they did these acts as strangers to these men, or whether they did them under the pretension of trustees or leaders of an association to which these men belong. And if the latter appears, you may inquire whether their acts and conduct in that respect were in faithful and conscientious execution of their supposed authority, or were simply a use of that authority as a guise to advance personal ambition or satisfy private malice. There is honest leadership among these, our laboring fellow-citizens, and there is doubtless dishonest leadership. You should not brand any act of leadership as done dishonestly or in bad faith unless it clearly so appears. But if it does so

appear—if any person is shown to have betrayed the trust of these toiling men, and their acts fall within the definition of crime, as I have given it to you—it is alike the interest, the pleasure and the duty of every citizen to bring them to swift and heavy punishment." In re Charge to Grand Jury (1894), 62 Fed. R. 831–833.

¹Old Dominion S. S. Co. v. McKenna, 30 Fed. R. 48. In support of these propositions Judge Brown cited the following authorities: Greenh. Pub. Pol. 648, 653; People v. Fisher, 14 Wend. 1; Tarleton v. McGawley, Peake, 205; Rafael v. Verelst, 2 W. Bl. 1055; Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 333, 337; Gregory v. Duke of Brunswick, 6 Man. & G. 205; Gunter v. Astor, 4 J. B. Moore, 12; Reg. v. Rowlands, 17 Adol. & E. (N. S.) 671, 685; Mogul St. Co. v. McGregor, 15 Q. B. Div. 476; Walker v. Cronin, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1; State v. Donaldson, 32 N. J. Law, 151; Master Stevedores' Ass'n v. Walsh, 2 Daly, 1, 13; Johnston Co. v. Meinhardt, 60 How. Pr. 168; Slaughter-house Cases, 16 Wall. 36, 116.

nels for investments, when enterprise and development will be crippled, when interstate railroads and canals and means of transportation will become dependent on the paternalism of the national government, and the factory and the workshop subject to the uncertain chances of the co-operative system.”¹

§ 508. It is an actionable conspiracy for an association to attempt to injure or destroy the business of another because that other refuses to be bound by a scale of prices fixed by the association and to become a member.² Certain laundrymen of Chicago organized an association and fixed a scale of prices for work. In order to compel a laundress to conform to the scale of prices, they induced parties who were doing her work to refuse to do the same any longer, and they induced laundries to refuse to do her work. In defense to an action on the case it was urged that the parties to the combination could not be held liable for merely inducing others to break their contracts; that the parties who broke their contracts were the only ones liable, inasmuch as they were free agents and were not coerced or influenced by force or fraud; it was also urged that the acts of the defendants were not mere malicious acts and done with the sole intent of causing injury, but that they were in the line of legitimate trade competition. In response to this contention the court said: “The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. No persons, individually or by combination, have the right to, directly or indirectly, interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses wilfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another’s trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for

¹ Greene, V. C., in *Barr et al. v. Essex Trades Council*, 53 N. J. Eq. 101, Ill. 608.
30 Atl. R. 881.

² *Doremus et al. v. Hennessy*, 176

him, or causing them to leave his employ by fraud or misrepresentation, or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss. A conspiracy may, when accompanied by an overt act, create a liability, by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another, by which all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done, and which was done in pursuance of the conspiracy, would be alike liable, whether actively engaged in causing the loss or not. For acts illegally done in pursuance of such conspiracy, and consequent loss, a liability may exist against all of the conspirators."

The court in the same case also said: "Every man has a right under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. Damage inflicted by a fraud or misrepresentation, or by the use of intimidation, obstruction or molestation, with malicious motives, is without excuse, and actionable. Competition in trade, business or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious, and an act maliciously done with the intent and purpose of injuring another is not lawful competition."¹

¹ The court further said: "In this case it is clear the evidence sustained the allegations of the plaintiff's declaration, and there is here no contention on the facts. The principles herein announced are sustained by the weight of authority in England and in this country. *Lumley v. Gye*,

§ 509. A combination to coerce an employer to conduct his business with regard to the employment of apprentices and members of a labor union according to the rules, regulations and demands of the union, by threatening or actually injuring his business through notices sent to customers and parties with whom he dealt, which notices are to the effect that if the parties to whom notices are sent deal with him they will be subjected to a similar boycott,—such a combination is an unlawful conspiracy, and the party injured has a right of action against the union and all its agents engaged in such unlawful conspiracy for any damages occasioned thereby.¹

2 E. & B. 216; *Blake v. Lanyon*, 6 T. R. 22; *Sykes v. Dixon*, 9 A. & E. 693; *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 Com. B. 247; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 id. 555; *Chipley v. Atkinson*, 1 S. R. 934; *Delz v. Winfree* (1891), 80 Tex. Sup. 400; 16 S. W. R. 111; *Curran v. Galen*, 22 N. Y. Sup. 826; *Van Horn v. Van Horn*, 52 N. J. L. 284. It is urged by appellants that they cannot be held liable for inducing certain persons named in the declaration to terminate their contractual relations with appellee, because their acts could not produce the injuries complained of without an independent force which was the act of the parties themselves, and these appellants, it is urged, cannot be held liable for an intervening cause of damage sufficient to cause the injury; and that the refusal of different persons to work for the appellee was sufficient of itself to occasion injury, for which the appellants cannot be held responsible. The first branch of this proposition has been disposed of by what we have heretofore said and the authorities above cited. In *Lumley v. Gye*, 2 E. & B. 216, it was said: 'He who maliciously procures a damage to another by a violation of his right ought to be made to indemnify.' In *Bowen v. Hall*, L. R. 6

Q. B. D. 333, it was said: 'Merely to persuade the person to break his contract may not be wrongful in law or in fact, but if the persuasion be used for the direct purpose of injuring the plaintiff . . . it is actionable, if injury ensues from it.' The second branch of the proposition, in which it is urged that appellants could not produce the injuries complained of without the intervention of an independent force, presents the question whether the proximate cause of the injury is a question of fact. It has been settled by the adjudication of this state, so far as this question is here concerned, that in this state what was the cause of the injury, or the combination of causes producing it, is a question of fact. Whether the injury and damages sustained by plaintiff resulted from the acts of the defendant or were the result of a new independent factor for which appellants were not responsible, cannot be determined by the court as a question of law, unless the fact be conceded or the proof be substantially all to that effect. *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; *City of Mt. Carmel v. Howell*, 137 id. 91; *Meyer v. Butterbrodt*, 146 id. 131. The finding of the trial and appellate courts on this question is not subject to review in this court."

¹ *Moores & Co. v. Bricklayers' Union et al.* (1890), 23 Wkly. Law Bul. 48;

§ 510. Every man, whether employer or employee, is entitled to carry on his business and dispose of his labor according to his own pleasure, so long as he keeps within the law. If any one in the exercise of such right occasions loss to another, the other has no ground of action. In a legitimate clash of common rights the loss which is suffered is *damnum absque injuria*. The profits of an employer may be reduced by being compelled to pay his employees higher wages. Such loss arises merely from the exercise of the employee's lawful right to work for such wages as he can obtain.¹

§ 511. The normal operation of competition is the withdrawal of patronage from competitors by inducements offered to the trading public. The normal operation of the right of labor regarding wages is the securing of better terms by refusing to contract to labor except upon such terms.²

affirmed by the supreme court of Ohio without an opinion.

¹ *Moore & Co. v. Bricklayers' Union et al.* (1890), 23 Wkly. Law Bul. 48.

² *Moore & Co. v. Bricklayers' Union et al.*, *supra*. In this case the court said:

"In the case at bar, instead of defendants persuading plaintiffs' customers, they coerced them to inflict the loss. While the difference may save plaintiffs' customers from liability to plaintiffs, because their acts were induced by fear of loss of their own trade, the conduct of the defendants in bringing coercion to bear is *a fortiori* as unlawful, and as much without excuse, as if the means used had been persuasion. There would be in such case an entire want of any reason or justification for the customers' acts except such as the defendants, with the intent to injure plaintiffs, themselves created.

"The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to

contract to labor except on such terms. Thus, in the *Mogul Steamship Co.* case, it was held to be merely lawful competition to offer great inducements to the public in one year, with intent to cause loss to rivals and drive them out of the trade, so as to get better prices the next year. If the workmen of an employer refuse to work for him except on better terms at a time when their withdrawal will cause great loss to him, and they intentionally inflict such loss to coerce him to come to their terms, they are *bona fide* exercising their lawful right to dispose of their labor for the purpose of lawful gain. But the dealings between Parker Bros. and their materialmen, or between such materialmen and their customers, had not the remotest natural connection, either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which in its exercise brought them into legitimate conflict with

§ 512. Interfering with business by threats and intimidation — Display of banners.— A combination to prevent employees from continuing their service and to prevent others from taking their places, by means of threats and intimidation, and the display of banners bearing threatening devices, is a conspiracy.¹

the right of defendants to dispose of their labor as they chose. The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros., and upon failure of this to use plaintiffs' customers' right of trade to injure plaintiffs. Such effort cannot be in the *bona fide* exercise of trade, is without just cause, and is therefore malicious. The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands. The remote motive of wishing to better their condition by the power so acquired will not, as we think we have shown, make any legal justification for defendants' acts.

"The discussion up to this point has ignored the element of combination in the acts of the defendants. But such cases can rarely, if ever, arise, because the power of a single individual to put into operation such a chain of causes as are necessary to inflict loss is hardly to be conceived. The combination of individuals to effect such a purpose is generally indispensable to its success. . . . We are of opinion that even if acts of the character and with the intent shown in this case are not actionable when done by individuals, they become so when they are the result of combination, because it is clear that the terrorizing of a community by threats of exclusive dealing in order to deprive one obnoxious member of means of sustenance will become both dangerous and oppressive."

¹Sherry v. Perkins et al. (1888), 147

Mass. 212, 17 N. E. R. 807. In this case one of the banners carried bore the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U." Another banner bore the following inscription: "Lasters on a strike; all lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U."

The court said: "The case finds that the defendant entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff from continuing in such employment, and to prevent others from entering into such employment; that the banners, with their inscriptions, were used by the defendants as part of the scheme, and that the plaintiff was thereby injured in his business and property. The act of displaying banners with devices, as a means of threats and intimidation, to prevent persons from entering into or continuing in the employment of the plaintiff, was injurious to the plaintiff, and illegal at common law and by statute. Pub. St., ch. 74, sec. 2; Walker v. Cronin, 107 Mass. 555. We think that the plaintiff is not restricted to his remedy by action at law, but is entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiff's bill, and continued to be used at the time of the hearing. The injury was to the plaintiff's business, and adequate remedy could not be given by damages in a suit at law. The wrong is not, as argued by the de-

§ 513. **Combination to compel manufacturer to abandon use of labor-saving machinery.**—A combination to compel a manufacturer of casks and barrels to discontinue the use of a hooping machine, by notifying the customers of the manufacturers not to purchase machine-hooped barrels, and by inducing the members of labor organizations throughout the country, and all parties in sympathy with them, not to purchase commodities packed in machine-hooped barrels, is an unlawful conspiracy. A manufacturer may recover whatever damage is sustained as the result of such conspiracy, and is also entitled to an injunction.¹ Each man, within lawful bounds, has the right to carry on his business as he sees fit and to use such implements and processes of manufacture as he may desire, and the law will afford him protection against any combination the object of which is to deprive him of such rights and to dictate his course by intimidating customers and destroying patronage.²

A conspiracy to compel a manufacturer to abandon the use of labor-saving machinery has no resemblance whatsoever to a lawful combination among laborers to withdraw from a given employment as a means of obtaining better pay.³

fendants' counsel, a libel upon the plaintiff's business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiff's business. The scheme, in pursuance of which the banners were displayed and maintained, was to injure the plaintiff's business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiff. The banner was a standing menace to all who were or wished to be in the employment of the plaintiff, to deter them from entering the plaintiff's premises. Maintaining it was a continuous unlawful act, injurious to the plaintiff's business and property, and was a nuisance such as a court of equity will grant relief against. *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Spinning Co. v. Riley*, L. R. 6 Eq. 551. *Diatite Co. v. Manufac-*

turing Co., 114 Mass. 69, was a case of defamation only. Some of the language in *Spinning Co. v. Riley* has been criticised, but the decision has not been overruled. See *Diatite Co. v. Manufacturing Co.*, *supra*; *Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, 3 C. P. Div. 339; *Loog v. Bean*, 26 Ch. Div. 306; *Food Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, *id.* 864; *Hill v. Davies*, 21 Ch. Div. 778; *Day v. Brownrigg*, 10 Ch. Div. 294; *Gaskin v. Balls*, 13 Ch. Div. 324. Decree for plaintiff."

¹ *Hopkins et al. v. Oxley Stave Co.* (1897), 83 Fed. R. 912.

² *Hopkins et al. v. Oxley Stave Co.*, *supra*.

³ *Hopkins et al. v. Oxley Stave Co.*, *supra*. In its opinion the court said:

"While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the

§ 514. Combination to coerce labor.—The capital of the laborer is his labor, together with his skill, and he has the right to employ his talents and industry as he pleases, free from the dictation of others; and where two or more persons com-

power to enjoin the members of such association from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract (Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. R. 310), yet they have very generally condemned those combinations usually termed 'boycotts,' which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. A conspiracy to compel a manufacturer to abandon the use of a valuable invention bears no resemblance to a combination among laborers to withdraw from a given employment as a means of obtaining better pay. Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service, either singly or in a body, if the wages paid or the conditions of employment are not satisfactory; but they have no right to dictate to an employer what kind

of implements he shall use, or whom he shall employ. Many courts of the highest character and ability have held that a combination such as the one in question is admitted to have been is an unlawful conspiracy at common law, and that an action will lie to recover the damages which one has sustained as the direct result of such a conspiracy; also, that a suit in equity may be maintained to prevent the persons concerned in such a combination from carrying the same into effect, when the damages would be irreparable, or when such a proceeding is necessary to prevent a multiplicity of suits. The test of the right to sue in equity is whether the combination complained of is so far unlawful that an action at law will lie to recover the damages inflicted, and whether the remedy at law is adequate to redress the wrong. If the remedy at law is for any reason inadequate, resort may be had, as in other cases, to a court of equity.

"We think it is entirely clear, upon the authorities, that the conduct of which the defendants below were accused cannot be justified on the ground that the acts contemplated were legitimate and lawful means to prevent a possible future decline in wages, and to secure employment for a greater number of coopers. No decrease in the rate of wages had been threatened by the Oxley Stave Company, and, with one exception, the members of the combination were not in the employ of the plaintiff company. The members of the combination undertook to prescribe the manner in which the plaintiff company should manufacture barrels and casks, and to enforce obedience

bine to coerce his choice of employment or limit his freedom in any manner in that respect it is a conspiracy, whether the means employed are actual violence or any species of intimidation that works upon the mind.¹

to its orders by a species of intimidation which is no less harmful than actual violence, and which usually ends in violence. The combination amounted, therefore, to a conspiracy to wrongfully deprive the plaintiff of its right to manage its own business according to the dictates of its own judgment. Aside from the foregoing considerations, the fact cannot be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seems to have been one of great utility. If a combination to that end is pronounced lawful, it follows, of course, that combinations may be organized for the purpose of preventing the use of harvesters, threshers, steam looms, and printing presses, typesetting machines, sewing machines, and a thousand other inventions which have added immeasurably to the productive power of human labor and the comfort and welfare of mankind. It results from these views that the injunction was properly awarded, and the order appealed from is accordingly affirmed."

¹ State v. Stewart, 59 Vt. 273, 9 Atl. R. 559. In this case the court said: "The exposure of a legitimate business to the control of an association that can order away its employees and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice, and with every safeguard of protection that citizens under our system of government are entitled to enjoy. The direct tendency of such intimidation is to es-

tablish over labor and over all industries a control that is unknown to the law, and that is exerted by a secret association of conspirators, actuated solely by personal considerations, and whose plans, carried into execution, usually result in violence and the destruction of property."

The right of a man who is offered work and wishes to work, to work, is one of those natural and inalienable rights which should require neither constitutional guaranty nor protection by law; and yet it is the one right that is most frequently disregarded and most flagrantly infringed. The right of one workman to quit his employment is no greater than the right of another workman to take the vacant place; yet such is the political cowardice and truculency of executive officers charged with the enforcement of the law, that, through fear of the political power of organized labor, they fail utterly in the great majority of instances to give any adequate protection to unorganized labor. The history of nearly every strike discloses acts of violence and lawlessness committed against men whose sole offense is that, in the endeavor to earn a living, they seek employment in the places made vacant by the strikers. The very unions conducting the strikes frequently by their rules and by-laws limit the number of apprentices that may be employed, and frequently arbitrarily exclude workmen from membership so that the result is a close guild; if such a guild be permitted to control a given occupation by excluding from employment all workmen not members of the guild, the same process continued would distribute the

§ 515. A combination the object of which is to compel an employer to discharge a particular workman by threatening to prevent his obtaining other workmen, or to compel a workman to join a labor organization by threatening to prevent his obtaining work unless he does so, is a conspiracy.¹

§ 516. While force and violence are important elements in criminal prosecution, they are not necessarily factors in the application of civil remedies. A man may be intimidated by fear of loss of business, property or reputation, as well as by dread of loss of life or injury to health or limb; the extent of this fear need not be abject, but only such as to overcome his judgment or induce him not to do or to do that which otherwise he would have done or left undone; a combination to coerce or intimidate by any of these means is unlawful.²

While employees may combine together for the purpose of advancing their wages or bettering their condition, it is a conspiracy for a combination of miners to attempt to control and

working community into two hostile camps — those in and those without the guild. Other unions, with a broader appreciation of the situation, open their doors to all, and thereby remove the reproach that attaches to the union that attempts to limit its membership, and at the same time prevent by force or intimidation workmen who are not members from working either in place of or alongside its members. But whatever the rules, by-laws or policy of any union or unions, the right of the individual workman to work wherever he finds employment is one of those indisputable rights which lie at the very foundation of society. It is a right so sacred that it is beyond discussion. The denial of the right is the exercise of the very refinement of tyranny, and only the cowardly strong could be guilty of such a crime toward the helplessly weak. That it should be necessary for non-union workmen who have taken the places of striking union workmen, to camp in the heart of a great city behind bolted doors and barricades, pro-

tected by special policemen and watchmen, eating and sleeping upon the premises, in order that they may do the work they have the right to do, is a reproach to our civilization and a sad commentary upon our institutions. That any workman whose only crime is that he left his home searching for work, and finding a vacant place accepted the work and did what was given him to do faithfully and honestly, should have to be escorted through the streets of a great city by armed policemen and watchmen, followed and surrounded by a hooting and disorderly mob, in order that he might reach home safely, is a spectacle far from flattering to the pride of an American citizen. People who permit such things and look upon them with equanimity are evidently lacking in some of the essential qualifications for self-government.

¹ State v. Dyer (1894), 67 Vt. 690, 32 Atl. R. 814.

² Barr v. Trades Council, 53 N. J. Eq. 101, 30 Atl. R. 881.

dictate the wages that shall be paid, by threatening and intimidating all persons not members of their unions, and thereby by threats, intimidation and force preventing their working.¹

§ 517. But it has been held that a combination among employees to quit work unless another employee is discharged, by reason of which the latter is thrown out of his employment, is not actionable in the absence of malice, intimidation or violence.²

Clearly a combination the object of which is to coerce an employer into discharging an employee who is not a member of the combination has for its object the injuring and oppressing of another without any corresponding benefit to the members of the combination, and such combination is therefore a conspiracy. The Indiana court of appeals reasoned as follows: "None of the appellants were under any continuing contract to labor for their employer. Each one could have quit without incurring any civil liability to him. What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence or attempt at intimidation. There is no law to compel one man or any body of men to work for or with another who is personally obnoxious to them. If they cannot be by law compelled to work, I am wholly unable to see how they can incur any personal liability by simply ceasing to do that which they have not agreed to do, and for the performance of which they are under no obligation whatever. Under our law every workman assumes many risks arising from the incompetency or negligence of his fellow-workmen. It would be an anomalous doctrine to hold that, after his fellows have concluded that he was not a safe or even a desirable companion, they must continue to work with him, under the penalty

¹ *Cœur d'Alene Consol. Mining Co. v. Miners' Union* (1892), 51 Fed. R. 260. In this case force was actually used towards employees taking the place of the union men, and the attempt was even made to march such employees out of the state.

² *Clement v. Watson* (1895), 14 Ind. App. 38, 42 N. E. R. 367. In Indiana it has been held "that where a conspiracy is alleged to have been formed

to commit an act which, if done by one alone, would be an actionable wrong, or where the conspiracy charged is not by law a crime, then the conspiracy is not the gravamen of the action, and the tort for the accomplishment of which it was formed must be well pleaded in order to constitute a cause of action." *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. R. 930.

of paying damages if, by their refusal to do so, the works are for a time stopped, and he thrown out of employment. We cannot believe it to be in accordance with the spirit of our institutions or the law of the land to say that a body of workmen must respond in damages because they, without malice or any evil motive, peaceably and quietly quit work which they are not required to continue, rather than remain at work with one who is for any reason unsatisfactory to them. To so hold would be subversive of their natural and legal rights, and tend to place them in a condition of involuntary servitude." But this reasoning is not satisfactory. It is true that each workman acting on his individual responsibility could quit his employment at his pleasure, and he might assign as the cause for his quitting his objection to some other employee. It is quite another matter where a number of workmen combine together to exert the power of a combination against an employee; such a combination might deprive a workman of all opportunity of employment in a given locality, and compel him to sacrifice his home and move elsewhere; or it might coerce him into becoming a member of the combination upon terms that would be ruinous to him. Such a combination would not be a criminal combination, nor would it be a combination to do that which is unlawful either as a means or an end; but it would clearly be a combination to injure and oppress, and as such unlawful.

There is a radical distinction between a combination of employees for the purpose of oppressing and injuring other employees and a combination of employees for the purpose of carrying to a successful issue some controversy with the employer. The courts recognize the right of workingmen to combine together for the purpose of bettering their condition, and in endeavoring to attain their object they may inflict more or less inconvenience and damage upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to attain a legitimate purpose, namely, the advance of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the

other case the object sought is the injury of a third party; and while it may be argued that indirectly the discharge of the non-union employees will strengthen and benefit the union and thereby indirectly benefit the union workmen, the benefit to the members of the combination is so remote as compared to the direct and immediate injury inflicted upon the non-union workmen that the law does not look beyond the immediate loss and damage to innocent parties to the remote benefits that might result to the union.

§ 518. **The strike — Definition of.**— A strike is the quitting of work by a body of workmen in accordance with a plan pre-arranged by a combination of workmen, for the purpose of inducing or coercing an employer, by subjecting him to inconvenience or to loss and damage, in order that the combination may attain its object.¹

¹ In *Farmers' Loan & Trust Co. v. N. P. R. Co.*, 60 Fed. R. 803, the court said at page 819: "The term 'strike' has been variously defined. By Worcester, 'To cease from work in order to extort higher wages as workmen;' by Webster, 'To quit work in a body, or by combination in order to compel their employers to raise their wages;' the Encyclopedia Dictionary, 'The act of workmen in any trade or branch of industry when they leave their work with the object of compelling the master to concede certain demands made by them,—as an advance of wages, the withdrawal of a notice of reduction of wages, a shortening of the hours of work, the withdrawal of any obnoxious rule or regulation, or the like;' the Imperial Dictionary, 'To quit work in order to compel an increase or prevent a reduction of wages;' the Century Dictionary, 'To press a claim or demand by coercive or threatening action of some kind; in common usage, to quit work along with others, in order to compel an employer to accede to some demand, as for increase of pay, or to protest against something, as a

reduction of wages; as to strike for higher pay, or shorter hours of work.' Bouvier defines it: 'A combined effort of workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time.' The definition sanctioned by the court of appeals of New York in *Railway Co. v. Bowns*, 58 N. Y. 581, and embodied by Mr. Anderson in his law dictionary, is: 'A combination among laborers, or those employed by others, to compel an increase of wages, change in the hours of labor, a change in the manner of conducting the business of the principal, or to enforce some particular policy in the character of the number of men employed, or the like.' Mr. Black, in his law dictionary, defines it to be: 'The act of a party of workmen employed by the same master, in stopping work all together at a preconcerted time, and refusing to continue until higher wages or shorter time or some other concession is granted to them by the employer.'" And the court suggested the following as a more exact definition of a strike: "A combined effort among

§ 519. Elements of a strike.—It is apparent from the definition above suggested that a strike embraces the following elements:

(1) *A combination of employees.*—This combination usually takes the form of a union among the employees, which may

workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of, and the least effective of, the means to the end; the intimidation of others from engaging in the service, the interference with, and the disabling and destruction of, property, and resort to actual force and violence, when requisite to the accomplishment of the end, being the other, and more effective, means employed."

Commenting upon the several definitions, Judge Jenkins of the seventh circuit said: "Whichever definition may be preferred — and possibly no one of them is precisely accurate — there are running through all of them two controlling ideas: First, by compulsion to extort from the employer the concession demanded; second, a cessation of labor, but not the abandonment of employment. The stoppage of work is designed to be temporary, continuing only until the accomplishment of the design, and upon its accomplishment the resumption of employment. The cessation of labor is not a *bona fide* dissolution of contractual relations and an abandonment of the employment, but is designed as a means of coercion to accomplish the desired result. The cessation of labor is prearranged by the body of men through their organizations, and is to take effect simultaneously at a stated time, for the purpose of preventing the master from continuing his business, and to compel him to submit to the dictation of his servants. The definition

of the term proffered to the court at the argument, recognized by the labor organizations of the country, was this: 'A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of the employment are changed. The employee declines to longer work, knowing full well that the employer may immediately employ another to fill his place; also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employees to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions.' This latter definition recognizes the idea of cessation of labor, but not an abandonment of employment. It suggests that the latter may result at the option of the master. It does not in terms declare a combination to extort, or to oppress, or to interfere in any way with the business of the employer, except as injury might result as an incident to the cessation of service. If the latter be the correct definition of a strike, society has been needlessly alarmed. I doubt if in the light of the history of strikes the child would be recognized by this baptismal name. One who has read the history of the strike at Homestead, with its cruel murders and barbarous torture; one who has read of the various strikes on railways, when cars were fired, rails torn up, engines demolished, and life destroyed; one who has read of the not infrequent summoning of the

have been in existence for a long time prior to the strike, and which may and usually does have many other objects than those involved in a particular strike; but it frequently happens that the association or union is effected for the purpose of

militia by the authorities of the state to put down riot and turbulence—the universal concomitants of a strike—would hardly yield assent to the definition suggested as even faintly conveying the true idea of a strike, as known of all men. The only force suggested is the force of inertia, the compulsion wrought by cessation from labor. Such a strike would be a harmless affair, and generally inoperative to effect the end designed. It could be availing only by the combination of the entire labor force of the country—in the nature of things impracticable. Unless by other coercive measures the employer is prevented from obtaining men in the place of those who should cease to work, a strike would be a mere weapon of straw. That is well understood by these organizations. While according to the definition the employee knows “full well that the master may immediately hire another to fill his place,” he also knows full well that that must, at all odds, be prevented if the strike is to be made successful. Consequently the organizations provide, as confessed at the argument, for the expulsion and social ostracism of all members of the organizations who should not abandon work when the order to strike is given, or who should seek to fill the place of a striking member. Thus one of the most effective engines of compulsion is brought to bear upon unwilling members to effect the design of the combination. With respect to laborers not members and willing to work, other and not less effective means of intimidation must be and are employed in prevention of labor. The

history of strikes declares that this intimidation has always taken the shape of threats and personal violence. Constructive violence has failed in large measure to prevent the continuance of operation of business by the master. Naturally, therefore, we find resort to actual violence—the destruction of property, the disabling of railway trains, and the like.” *Farmers’ Loan & Trust Co. v. N. P. R. Co.*, 60 Fed. R. 803.

Commenting upon the foregoing views, Mr. Justice Harlan, sitting in the court of appeals, said (*Arthur et al. v. Oakes et al.*, 63 Fed. R. 310—this is the same case under a different title): “If the word ‘strike’ means in law what the circuit court held it to mean, the order of injunction, so far as it relates to strikes, is not liable to objection as being in excess of the power of a court of equity. Indeed, upon the facts presented by the receivers and admitted by the motion of the interveners, it was made the duty of the court to exert its utmost authority to protect both the property in its charge and the interests of the public against all strikes of the character described in the opinion of the circuit judge. But in our judgment the injunction was not sufficiently specific in respect to strikes. We are not prepared, in the absence of evidence, to hold, as matter of law, that a combination among employees, having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a ‘strike,’ within the meaning of the word as commonly used. Such a withdrawal, although amounting to

enforcing some particular demands by means of the particular strike. But whether the union be of long existence or the association is formed for the time being to meet an emergency, a combination is absolutely essential, since there could be no simultaneous quitting of employment for the purpose of attaining some object unless there is a confederating together.

(2) *Quitting work as a body.*—This is essential to make the strike effective, for otherwise the inconvenience and injury inflicted upon the employer is minimized. It sometimes happens that all the employees who have combined together and agreed upon a strike do not quit work simultaneously, but some remain for days at work in their several departments, leaving at the end of the week, or at the end of some particular job, as the case may be; but even in such instances the employees who remain for a time being do so only with the permission of the combination. As a rule the very object of the simultaneous cessation of work is to inflict the largest possible loss upon the employer; therefore it is the custom for strikers to lay down their tools at a given moment, whether that moment be at the close of a working-day or during any hour of that day. As a necessary consequence, not only great inconvenience but great pecuniary loss is usually inflicted upon the employer, who is kept in ignorance as to the exact time when the strike will occur and sometimes has no intimation whatsoever that a strike is pending.

(3) *Damage of the employer.*—The object of a strike being the infliction of either inconvenience or loss and injury upon

a strike, is not, as we have already said, either illegal or criminal."

And the learned justice quoted with approval the following by Sir James Hannen (see *Farrer v. Close*, L. R. 4 Q. B. 602): "I am, however, of opinion that strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen;' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injuring or molesting either masters

or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley*, 6 El. & Bl. 47, 68; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employees, or any other lawful purpose."

the employer, it is usually so conducted as to inflict the greatest possible damage under all the circumstances. Employees may simultaneously quit their employment without inflicting any injury whatsoever upon the employer. These cases are not frequent, but occur when the quitting is announced sometime in advance, or takes place at the termination of some particular job or the completion of some particular piece of work.

§ 520. The "sympathetic" strike.—A strike is designated as a "sympathetic" strike where the striking employees have no demands or grievances of their own, but strike for the purpose of indirectly aiding other unions or organizations who have struck.¹

§ 521. A strike may be legal or illegal.—A strike is not necessarily illegal. Its legality depends entirely upon its object and the means by which it is enforced. It is criminal if any of the objects of the combination embrace a criminal purpose; it amounts to civil conspiracy if the object of the combination is to injuriously oppress others; or it may be entirely legal if it be the result of voluntary combination and action among the employees for the purpose solely of benefiting themselves by raising their wages, or for any other lawful purpose, and is conducted in a lawful manner.²

§ 522. The following fundamental propositions determine the legality or illegality of any given strike:

Employees have the same right to combine together for the lawful advancement of their interests that employers have, and, providing there is no continuing contract of employment, and no violation of any duty arising out of the nature and character of the service, employees acting as a combination have the same right to leave as a body that the employer has to dismiss, providing always that the action of the combination is for the purpose of advancing the legitimate interests of its

¹ The great strike of the American Railway Union, of 1894, was of a "sympathetic" character. The original grievance was entirely between the Pullman Palace Car Co. and its employees in the small town of Pullman, a short distance from Chicago. The American Railway Union attempted to aid the striking Pullman

employees by demanding that the various railway companies cease hauling Pullman cars, and by inaugurating a strike of railway employees upon all the roads refusing to accede to that demand.

² Arthur et al. v. Oakes et al., 63 Fed. R. 310.

members, and not for the purpose of oppressing or injuring others.

§ 523. As commonly understood, the term "strike" means the quitting of work by employees in a body in accordance with a pre-arranged plan, the object being to coerce the employer into granting some demand by inflicting upon him the greatest possible damage. But before a strike can be pronounced illegal the object in view as well as the means to be employed must be taken into consideration. If the object be simply to advance the interests of the employees without injuring or oppressing some third person, then the strike is not illegal, even though some inconvenience, loss or damage result to the employer. For instance, workmen may combine together to secure an advance of wages, shorter hours, or some other legitimate advantage, and they may consult with their employers, and if they fail to agree they may notify their employers that they will leave the work in a body; and even though their quitting may leave the employer for the time being without any employees, and thereby occasion him great loss and inconvenience, still the action of the employees cannot be condemned as illegal unless they violate some continuing contract or abandon their employment under such circumstances as to wantonly and maliciously inflict great injury to property or threaten loss of life. And in this connection it may be said that a combination comes dangerously near being a civil conspiracy if, in agreeing upon a strike and actually striking, it chooses an hour when the condition of the work in hand is such that the abandonment of the work is equivalent to an actual and wilful destruction of the property. There is little distinction between the wanton or malicious destruction of property and the abandonment of an occupation at a moment when the employees know that great and irreparable loss must occur to the work in hand by reason of lack of attention. A combination which chooses that moment for striking which will occasion the greatest destruction of property by reason of lack of attention amounts to a civil conspiracy. Such means are not the legitimate pursuit of a lawful end. There is a very great difference between striking with the immediate object of injuring and destroying property that needs for a time immediate attention and striking with simply the object of attaining a legitimate

end by inflicting upon the employer the inconvenience and loss which are commonly incidental to the unexpected desertion of employees.

§ 524. Where eighteen journeymen tailors employed in one shop conspired together to strike and return the work in their hands in an unfinished condition, and did as a matter of fact stop work, returning the unfinished garments in such a condition as to render them worthless, and the employer could not get any journeymen to finish the work, such a conspiracy is actionable.¹

§ 525. Conspiracy to oppress by inducing a strike.—A combination to induce employees who are not dissatisfied with the terms of their employment to strike, for the purpose of inflicting injury and damage upon the employer, is illegal, and such malicious and illegal interference with the employer's business is actionable.²

¹ Mapstrick et al. v. Ramge (1879), 9 Neb. 390. In Jones v. Baker et al., 7 Cow. 445, a merchant tailor was engaged in carrying on a profitable trade, the successful prosecution of which depended largely on a knowledge of certain things known to very few people. A party conspired with his foreman to obtain the secrets of the business, and did obtain them, and was thereby enabled to become a successful rival in the trade and injure the merchant tailor. The combination between the foreman and competitor amounted to an actionable conspiracy. In these actions actual conspiracy need not be proved; it may be inferred from circumstances, among which are the acts of the parties in doing the injury which was the object of the conspiracy.

² Old Dominion S. S. Co. v. McKenna et al., 30 Fed. R. 48. This was an action to recover \$20,000 damages alleged to have been sustained by the Old Dominion Steam Ship Co. through the unlawful action of defendants in a strike of longshoremen. In deciding the case Judge Brown

said: "I have carefully considered the elaborate arguments of counsel, and examined the numerous authorities referred to. For lack of time I can only state my conclusions:

"1. All the material averments are either stated positively, or the source of information is sufficiently indicated.

"2. The facts stated in the complaint and affidavit constitute a legal cause of action against all the defendants, for the actual damages suffered, for the following reasons:

"(a) The plaintiff was engaged in the legal calling of a common carrier, owning vessels, lighters and other craft used in its business, in the employment of which numerous workmen were necessary, who, as the complaint avers, were employed 'upon terms as to wages which were just and satisfactory.' (b) The defendants not being in plaintiff's employ, and without any legal justification, so far as appears—a mere dispute about wages, the merits of which are not stated, not being any legal justification,—procured plaintiff's workmen, in this city and in

Workmen may combine for the purpose of peaceably and without intimidation persuading their fellow-workmen to strike, in order to obtain an advance in wages, and they may lawfully pay the expenses of those who strike; and in this connection they may post up in their assembling room a list of persons who have contributed to the fund for the support of those who have struck.¹

southern ports, to quit work in a body, for the purpose of inflicting injury and damage upon the plaintiff until it should accede to the defendants' demands, and pay southern negroes the same wages as New York longshoremen, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable. (c) After the plaintiff's workmen, through the defendants' procurement, had quit work, the defendants, for the further unlawful purpose of compelling the plaintiff to pay such a rate of wages as they might demand, declared a boycott of the plaintiff's business and attempted to prevent the plaintiff from carrying on any business as common carrier, or from using or employing its vessels, lighters, etc., in that business, and endeavored to stop all dealings of other persons with the plaintiff, by sending threatening notices or messages to its various customers and patrons, and to the agents of various steamship lines, and to wharfingers and warehousemen usually dealing with the plaintiff, designed to intimidate them from having any dealings with it, through threats of loss and expense in case they dealt with the plaintiff by receiving, storing or transmitting its goods, or otherwise; and various persons were deterred from dealing with the plaintiff in consequence of such

intimidations, and refused to perform existing contracts and withheld their former customary business, greatly to the plaintiff's damage. (d) The acts last mentioned were not only illegal, rendering the defendants liable in damages, but also misdemeanors at common law, as well as by section 168 of the Penal Code of this state."

¹ Rogers et al. v. Evarts et al. (1891), 17 N. Y. Supp. 264. Referring to the issues, Smith, J., said: "The complaint in the action alleges that after the defendants had entered upon the strike, and others had been employed to take their places, in the plaintiffs' factory, the defendants coerced and induced the said new employees to leave the plaintiffs' employ by threats, violence, intimidation and persuasion. Upon the trial the defendants' counsel admitted that it was a violation of law to induce a servant to leave his master's employment, or to induce workmen to refrain from entering into employment, by means of any threat or violence; and it was further conceded by the defendants' counsel that it was a violation of law for strikers to assemble before a manufactory in such numbers as to intimidate those who were working therein. Upon the making of these concessions by the defendants' counsel, plaintiffs' counsel, at the suggestion of the court, refrained from offering any evidence to sustain such allegations of their complaint. The plaintiffs' right to an injunction herein, upon the concessions and upon the evidence, must,

§ 526. While the proposition has been laid down broadly that any person who knowingly entices away the servant of another, and thereby induces him to violate his contract with his employer, is liable to the employer for damages actually sustained,¹ this doctrine has been challenged in New York, and an injunction against the enticing away of the servant has been refused² in a case wherein the court said: "I am not satisfied with the reason of the rule. In the case of no other contract does a man render himself liable as for tort by inducing its violation by persuasion. I can see no reason why the contract of service should be made an exception. The servant is the equal in law of the master. He contracts with the master upon equal footing. Under the old common law the servant's condition was quite different. His position was more that of a slave. With the advance in civilization the reason for the rule has entirely passed away. It is, at least, a matter of grave doubt whether such right of action will ever be sustained in this state. An injunction is an extraordinary remedy. It should not be granted in cases of doubtful right; and the plaintiffs' prayer must be denied unless they can establish their right within some other rule of law."³

The tendency of modern thought and judicial decisions is

as against the striking cigar-makers, stand upon one of two grounds: First. That the plaintiffs have such a right to the service of those in their employment that any enticement therefrom is a legal violation of such right. Second. That plaintiffs had the right to perfect freedom in the management of their business, which included the right to procure service for such price as they might choose to pay, and as might secure to them such service, without obstruction by defendants; and that the defendants' acts constituted an illegal trespass upon this right. As against the defendants who are connected with the publication of the *Leader*, the plaintiffs' right to an injunction must rest upon the fact that they have encouraged and abetted some illegal act of the strikers."

¹See Wood's *Master and Servant*, secs. 230, 231, and the following cases: *Lumley v. Gye*, 2 El. & Bl. 216; *Milburne v. Byrne*, 1 Cranch, C. C. 239; *Fed. Cas. No. 9542*; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, id. 601; *Keane v. Boycott*, 2 H. Bl. 512; *Sykes v. Dixon*, 9 Adol. & E. 693; *Hartley v. Cummings*, 5 C. B. 247; *Pilking-ton v. Scott*, 15 Mees. & W. 557; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1; *Gunter v. Astor*, 4 J. B. Moore. 12; *Bowen v. Hall*, 6 Q. B. Div. 333; *Bixby v. Dunlap*, 56 N. H. 456; *Haskins v. Royster*, 70 N. C. 601; *Dickson v. Dickson*, 33 La. Ann. 1261.

²*Rogers et al. v. Evarts et al.* (1891), 17 N. Y. Supp. 264.

³See *Harvester Co. v. Meinhardt*, 9 Abb. N. C. 893; *Cooley, Torts*, p. 280.

the enlargement of the right of combination, whether of capital or labor. "Irrespective of any statute, I think the law now permits workmen, at least within a limited territory, to combine together, and by peaceable means to seek any legitimate advantage in their trade. The increase of wages is such an advantage. The right to combine involves of necessity the right to persuade all co-laborers to join the combination. This right to persuade co-laborers involves the right to persuade new employees to join the combination. This is but a corollary of the right of combination."¹

There may be, however, cases in which persuasion and entreaty are not lawful instruments to effect the purposes of a strike. Persuasion and entreaty may be used in such a manner and with such persistency and under such conditions as to constitute intimidation. Their use then becomes a violation of law.²

§ 527. Lawlessness not an essential element in a strike.—Owing to the fact that so many strikes are accompanied by acts of lawlessness on the part of the striking employees, who seek to prevent other workmen from taking their places, the strike as a means to obtain a legitimate end has fallen into no little disrepute, and even courts have come to consider that the lawlessness following a strike is in some manner one of its necessary incidents. Such is not the case. The determination to strike unless certain demands are granted is one thing, while the prevention of other workmen from taking the places of the strikers is quite another thing, and the one has no necessary relation to the other.

§ 528. Conspiracy to coerce workmen to join union.—Combinations designed to coerce workmen to become members of a union, or the object of which is to interfere with, obstruct, vex or annoy other workmen in working, or in obtaining work because they are not members of the union, or in order to compel them to become members, or the object of which is to prevent employers from making just discriminations of wages between skillful or unskillful workmen, between diligent and lazy workmen, between efficient and inefficient workmen, are illegal.³

¹ From the opinion of the court in *Old Dominion S. S. Co. v. McRogers et al. v. Evarts et al.*, *supra*. *Kenna et al.*, 30 Fed. R. 48.

² *Rogers et al. v. Evarts et al.*, *supra*.

§ 529. Labor unions and organizations like other voluntary associations must depend for their membership upon the free and untrammelled choice of each individual member. No resort can be had to compulsory methods of any kind, either to increase, keep up or retain such membership; nor is it permissible for labor organizations to enforce the observance of their by-laws and regulations through violence, threats or intimidation; nor is it lawful for them to employ methods that amount to intimidation, or that would interfere with that freedom of action which is the right of every person.¹

But where it is specifically provided by law that two or more persons may unite and combine together to persuade or encourage others by peaceable means to enter into a combination or union, the rule of the common law is modified, and members of a union may not only exclude workmen who seek to join the union, but may bring pressure to bear to prevent workmen entering the employment of any person or corporation with which the union is in controversy.²

In the case last cited³ all the members of the Master Stonecutters' Association of the city of Newark, together with two certain workmen, filed a bill against the Journeymen Stonecutters' Association, praying that the defendant association be required to admit the two workmen and all other journeymen stonecutters residing in Newark as members of the association upon their paying the customary dues and complying with the by-laws; and that the association, its officers, and all connected therewith, be enjoined from denouncing the two workmen in question as "scabs," or in any manner persecuting or injuring them on account of their exercising a lawful trade without being admitted to membership in the union; and that the association be enjoined from attempting to coerce or intimidate the master stonecutters from employing the two workmen or any other skilful journeymen whether members of the union or not.⁴

¹ Long Shore Printing Co. v. Howell, 26 Oreg. 527, 88 Pac. R. 547.

² Mayer et al. v. Journeymen Stonecutters' Ass'n (1890), 47 N. J. Eq. 519, 20 Atl. R. 492.

³ Mayer et al. v. Journeymen Stonecutters' Ass'n, *supra*.

⁴ The court further defined the issues as follows: "This prayer for relief is based on the allegations that the master stonecutters complainants are, in the prosecution of their business, constantly in need of a body of skilled journeymen stonecut-

Regarding the rights of labor organizations to make by-laws and rules for admission the court said: "These organizations are formed for purposes mutually agreed upon; their right to make by-laws and rules for the admission of members and the

ters, in order to enable them to fulfill their contracts; that Hahn and Zimmerman are such skilled journeymen stonecutters, desirous of obtaining employment at their trade, but prevented from doing so by the acts of the defendants complained of. These are recited substantially as follows, viz: That it is the avowed purpose of the association defendant to embrace within its membership all the journeymen stonecutters who shall be permitted to pursue their trade in Newark and its vicinity; to prevent any journeyman stonecutter not a member of the association from working at his trade at Newark and vicinity; and to coerce any master stonecutter to refuse to employ any such journeymen not a member of the association. That the means adopted by the association to accomplish these objects are denunciation and persecution applied to the offending workmen, and boycotting and strikes applied to the offending employer. That the by-laws adopted by the said association provide that any member who works in any place styled in the association as a 'scab-shop,' or who violates the constitution of the association, is to be denounced as a scab, and forfeits his claim as a member. That similar methods of coercion are employed by the association to prevent journeymen not members from working, and to deter employers from giving them work, by declaring the shops of such employers 'scab-shops,' and publicly declaring such workmen as 'scabs,' and also as to both such workmen and employers by resorting to strikes and boycotts. That the by-laws of the association also provide for a 'shop steward,' to be placed in every master stonecutter's shop or yard, to see that the rules of the association are carried out; that, under the practice and regulations of the association, such 'shop steward' is required immediately to order a strike of all the workmen in any shop, if the employer allows any journeyman to work unless he produces a card of the association showing that he is a member thereof in good standing, and if such strike should prove inefficient it is the policy and practice of the association to coerce the employer further by boycotting and other alleged unlawful deeds. That in the month of May, 1889, or about that time, the association, by resolution, determined to admit no more members for the space of one year, thus excluding from employment all stonecutters seeking work not already admitted to membership; that in the summer of 1889 the complainants, Hahn and Zimmerman, who reside in Essex county, with families dependent on their labor, applied for admission to said association, and offered to pay all dues and contributions, and to fulfill its obligations in order that they might obtain work at their trade; but their application was refused on no other ground than the said resolution to exclude all new members; that afterwards Hahn and Zimmerman applied to two of the complainant master stonecutters for work as journeymen, but they were refused such employment on no other grounds than that they were not members of the association, and that their employment would result, under the rules of the association, in a general

transaction of business is unquestionable; they may require such qualifications for membership and such formalities of election as they choose; they may restrict membership to the original promoters, or limit the number to be thereafter admitted. The very idea of such organizations is association mutually acceptable, or in accordance with regulations agreed upon; a power to require the admission of a person in any way objectionable to the society is repugnant to the scheme of the organization. While courts have interfered to inquire into and restrain the action of such societies in the attempted exclusion of persons who have been regularly admitted to membership, no case can, I think, be found where the power of any court has been exercised, as sought in this case, to require the admission of any person to original membership in any such voluntary association. Courts exist to protect rights, and where the right has once attached they will interfere to prevent its violation, but no person has any abstract right to be admitted to such membership; that depends solely upon the action of the society, exercised in accordance with its regulations, and until so admitted no right exists which the courts can be called upon to protect or enforce. Neither is it clear upon what ground of jurisdiction the court can inquire into the action of the defendant association in the passage of the resolution complained of. It is alleged in the bill that this was to shut the

strike of the other workmen and in disaster to their business. It is further alleged that, in consequence of their exclusion by said association, Hahn and Zimmerman have been deprived of the power of exercising their trade, in which they could have made a living and supported their families, and have been compelled to abandon their trade and work at inferior labor with lower wages; that two master stonecutters complainants were, at the time of the application by Hahn and Zimmerman to the defendant association for membership, in need of larger numbers of skilled journeymen stonecutters than they could obtain from among the members of the association, and

would have given them employment but from the danger to their business which they knew would ensue, and that for these reasons they were obliged to refuse, and did refuse, to employ the two men; that Hahn and Zimmerman are able and anxious to exercise their trade for the support of their families, and that all of the master stonecutters complainants are in need of their services as stonecutters and willing to give them employment; that the two are only prevented from working, and said employers from giving them work, by the exclusion of them from the association, and the coercion of the employers to refuse them work because they are not members."

door to admission to membership for one year, and to confine employment to the present membership. It appears from the testimony, however, that it was passed to prevent the admission of persons known as 'harvesters.' This is a term used in the trade to designate foreigners, skilled workmen, who come to this country when work is plenty and wages high, get employment, and in the winter return with their earnings to their homes in foreign countries; and that such was its scope is shown by the fact that persons not coming within that class were admitted to membership after the passage of the resolution. In the light of national legislation, with reference to the importation of contract labor, it can scarcely be said that such action is against the policy of the law. But the body has clear right to prescribe qualifications for its membership; it may make it as exclusive as it sees fit; it may make the restriction on the line of citizenship, nationality, age, creed or profession, as well as numbers. This power is incident to its character as a voluntary association and cannot be inquired into, except on behalf of some person who has acquired some right in the organization and to protect such right."¹

¹ After referring to the following cases (*Prudential Assurance Co. v. Knott*, L. R. 10 Ch. App. 142; *King v. Journeymen Tailors of Cambridge*, 8 Mod. 10; *The Case of the Boot and Shoemakers of Philadelphia*, 1806; *Old Dominion S. S. Co. v. McKenna et al.*, 30 Fed. R. 48; *New York, Lake Erie & Western R. R. Co. v. Wenger*, 17 Wkly. Law Bul. and Ohio L. J. 806; *Mogul Steamship Co. v. McGregor et al.*, 15 Q. B. Div. 476, 21 Q. B. Div. 544, 23 Q. B. Div. 598; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551), the vice-chancellor concluded as follows: "So that, in the whole history of the long-continued struggle which has been going on between these combinations on the one hand, and the employers on the other, there is but one reported and one unreversed case where a court of equity has, by its writ of injunction, attempted to control the actions of these associations, and then only to prevent a continuing trespass upon the lands of the complainant. Of course, the well known interference of the court for the protection of property, and the action of a receiver, appointed by it, of the property of an insolvent corporation, operated under the order of the court, and threatened by the action of such combination, stands upon an established and well-defined basis, to which no fact in this case can apply. It is true that most of the cases cited by the learned counsel were prosecutions for combinations which at common law are held to be criminal, and it may be urged that as the court would not interfere by injunction to prevent the commission of crime, no case has been presented for adjudication. Without stopping to consider whether there are well-established exceptions to the rule, I fail to appreciate the strength of the position

§ 530. **Oppressive rules and by-laws of unions.**—A by-law providing that each member of a union shall report in open meeting each week the work he has done during the week, and if it appears that the work was done in competition with any other member of the union, the member doing the work shall pay into the treasury of the union a sum fixed according to a scale agreed on, is void.¹

The rules and by-laws of a union are void where the object is a combination to stifle competition and create a monopoly in a particular trade or occupation.²

A by-law of a union which requires that all members of a union who compete with other members of the same union shall pay into the treasury, as a penalty for the competition,

that the court will interfere to prevent an act which is not unlawful, when it would not so interfere to restrain the doing of an illegal act. Whatever may have been the rule of the common law with reference to such acts as are under consideration, and however criminal many of them have heretofore been considered, the legislature of this state has greatly changed the law which declared combinations to effect such purposes unlawful. By the act of 1888 (Rev. Sup., p. 774, § 80) it is provided that: 'It shall not be unlawful for any two or more persons to unite, combine or bind themselves, by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering or entering into the employment of any person or persons or corporations.' In fact the policy of the law with reference to such combinations was revolutionized, and what before that time would have been held to be an unlawful combination and conspiracy, became in this state a lawful association, and acts which had been the subject of indictment became inoffensive to any provision of our

law. Nothing has been proved in this case to warrant a finding that the defendants have done or threatened aught that is not legalized by this act of the legislature. It is true that much of intent is charged in the bill which might overstep the boundary line defined by the law, but there is no evidence to sustain the assumption that any unlawful act to the injury of the complainants' rights of property is threatened by the defendants. They have agreed not to work with any but members of their association, and not to work for any employer who insists on their doing so, by withdrawing from his employment. So long as they confine themselves to peaceable means to effect these ends, they are within the letter and spirit of the law, and not subject to the interference of the courts. These considerations result in the conclusion that this court has no jurisdiction to grant the relief prayed for, and that the bill must be dismissed."

¹ Bailey et al. v. Association of Master Plumbers of City of Memphis (1899), 52 S. W. R. 853.

² Bailey et al. v. Association of Master Plumbers of City of Memphis, *supra*.

certain sums of money fixed according to a schedule of work, involves two unlawful results: First, the destruction of free and natural competition among members; second, the arbitrary and unreasonable increase of prices to customers.¹

¹ *Bailey et al. v. Association of Master Plumbers of City of Memphis, supra*, where the court said: "Though the by-law does not in terms require the member doing competitive work to increase the price he would otherwise exact of the customer, such increase is its natural tendency and effect, as would readily be supposed from its scope, and as is conclusively demonstrated by this record. The president of the association testified that 'usually he had added this amount (that fixed by the schedule of the by-law in question) to the price of such work as he thought he was bidding on in competition with others, but that, so far as the rule of the association was concerned, he was at liberty to fix his own price, and to do the work at a loss if he saw fit. He did not know whether, as a general thing, the members of the association added the charges to the price fixed for their work or not, but he supposed it was usually done whenever the member thought the work was to be done upon competitive bids.' Other members gave testimony on the same subject. One of them said: 'The practice of the members was this: When a customer would come in to buy an article (a tub, for instance), it would be assumed that he would get prices from other members. This would therefore be understood as a competitive job, which the member would have to report. He would figure the cost, add his legitimate profit, the whole amounting, say, to \$30, and to that he would add the tariff of \$7.50 on tubs, and charge the customer \$37.50.' Another one said: 'The members would add the tariff to their regular charges, and

pay it to the association.' And still another one said that 'he usually added the amount to be paid the association to the price of work on which he bid in competition, but that there was no rule requiring it done. If he ever failed to do it, it was because he forgot it.' No witness testified to a different course of business, or mentioned a single instance in which the customer was not required to bear the burden of this tax or tariff by paying a price enhanced to that extent. Though influential in both particulars, this by-law is not shown to have reduced competition among the members of the association so much as it enhanced prices. In the latter respect it exerted a very large and most hurtful influence upon the public. The arbitrary and unreasonable enhancement in prices was rendered easy, and consequently the more widely harmful and oppressive, by the fact that most of the plumbers in the city of Memphis were members of the association, and that an imperative ordinance of the municipality, as well as the dictates of health and comfort, required all inhabitants to procure and use many of the things for whose sale and construction the association exacted the tax or tariff from its members. The provision is obviously an unreasonable restraint upon trade, and, being so, it is contrary to public policy and void under the common law. It injuriously affects matters of prime importance and legal necessity to the community at large, by the impairment of the competition on the one hand, and the enhancement of prices on the other hand, and consequently no supposed

§ 531. A by-law is unlawful which provides that no member of the union shall purchase any supplies from any supply-house, manufacturer or dealer who does not comply with the rules and requirements of the union.¹ So also a by-law which provides that no member shall buy material of any kind from a jobber who buys material from a manufacturer selling to any party not a member of the union.² Such by-laws are illegal as in restraint of trade and providing for a boycott: "The restraint is four-fold. It operates upon members and upon dealers who sell to them, upon non-members and upon dealers who sell to them; and in each of the four particulars it interrupts that freedom in trade to which all of them were otherwise entitled and which the public is interested to have them enjoy. All members and non-members were of right entitled to buy from any and all dealers, at their election, yet the members are restricted to dealers who sell to none but members, and non-members are restricted to dealers who sell to none but non-members; and, likewise, all dealers were of right entitled to sell to all persons who desired to purchase, yet those of them who sell to members are forbidden to sell to others; and those who sell to others are thereby deprived of sales to members. Thus and to this extent the public loses the benefit of fair and free competition, which it is always entitled to have. These by-laws virtually divided the trade in plumbing materials and supplies for Memphis into two main parts, in the nature of combinations, one of them being represented by members of the association and dealers who sell to them alone, and the other being represented by non-members and dealers who sell to them alone; and thereby the two classes are intended to be arrayed against each other, not in fair and free competition, but with a view to the ultimate demolition of the latter class and the entire control of the trade by the former class. The underlying thought is the destruction of all competition with non-members by driving them out of the business, and the acquisition of the whole trade for members whose competition among them-

obligation resting upon it is capable of enforcement in a court of justice."

¹ Bailey et al. v. Association of Master Plumbers of the City of Memphis (1899), 52 S. W. R. 853.

² Bailey et al. v. Association of Master Plumbers of City of Memphis, *supra*.

selves and whose prices to customers are subject to the illegal rule already considered. It is entirely true¹ that, in the first instance, each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But, in our opinion, it does not follow from this undoubted freedom of individual member and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference in legal contemplation between individual right and combined action in trade is seen in numerous cases. Any one of several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade.'"²

¹ As in effect observed in *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. R. 1, and in *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. R. 1119.

² From the opinion of the court in *Bailey et al. v. Association of Master Plumbers of City of Memphis*, *supra*. See also *India Bagging Ass'n v. Kock*, 14 La. Ann. 164. The Tennessee court also held that the by-laws in question were obnoxious to the Tennessee statutes (Shannon's Code, §§ 8185, 6622), "which forbid and declare unlawful, null and void 'all trusts, pools, contracts, arrangements or combinations,' or corners, or other

devices that are intended to destroy or prevent, or that have a tendency to destroy or prevent, 'full and free competition in the production, manufacture or sale of any article of legitimate traffic,' or that 'are designed or tend to fix, regulate, limit,' reduce, or increase the price of such article, or to create a monopoly or a corner therein, or that may in any manner 'injuriously affect the legitimate trade and commerce of the country.' Whether these by-laws be regarded as a contract, an arrangement, a combination, or a trust, one or all — and we think they partake

§ 532. A by-law of a union is contrary to law which requires that all bids of the members of the union should be first submitted to a committee which should decide who was the lowest bidder, and that the lowest bidder should then add a certain percentage to the amount of the bid and present only the increased figures as his bid to the party desiring the work; and that the member of the union securing the work should pay into the treasury the amount of the increase on his bid.¹

§ 533. Certain contracts between labor unions and employers illegal.— Contracts between associations of employers and labor unions providing that all employees of the former should become members of the latter or else should be discharged are void as against public policy.²

of the nature of all of them,— there can be no reasonable doubt that they were intended and are well calculated to prevent full and free competition in the purchase and sale of articles of legitimate traffic, to influence the prices thereof, and thereby to injuriously affect trade and commerce within the territory contemplated.”

¹ Association v. Niezerowski, 95 Wis. 129, 70 N. W. R. 166. The supreme court of Wisconsin said: “The manifest purpose of the private by-laws was, by means of the combination thus effected, to suppress fair and free competition in bidding for building contracts in Milwaukee, and by such combination and method of bidding, upon its face apparently fair and free from objection, but in fact unfair and delusive, to compel owners to pay for the erection of buildings the sum of six per cent. in excess of what they would be otherwise obliged to pay for them if fairly let to the lowest bidder, uninfluenced by such combination. It seems to us that the restraint put upon the rights of the proprietors by the provisions of these by-laws or rules, as well as the entire scheme thus disclosed, is contrary to public policy, and therefore void. . . . While

all reasonable stipulations and means to protect labor or trade are laudable, we must hold that the means here sought to be employed are such as the law will not sanction. We must consider what may be done under such an agreement, and the result which it will necessarily produce. As already pointed out, the operation of this combination, under its private by-laws, is to suppress free and fair competition in bidding for contracts, and by delusive and deceptive means members of the association are enabled to exact from owners a higher price for buildings than they would otherwise have to pay.”

² Curran v. Galen et al. (1897), 152 N. Y. 33, 46 N. E. R. 297. In its opinion the court said: “In the general consideration of the subject, it must be premised that the organization or the co-operation of workmen is not against any public policy. Indeed, it must be regarded as having the sanction of law when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate. Penal Code, sec. 170. It is proper and praiseworthy, and perhaps falls within that general view of human

§ 534. Picketing — Obstructing highways — Nuisance.—

While the right of workmen to organize into associations cannot be questioned, and the right of members of such associations, either as individuals or as an organization, to cease to work for any employer, and to use all lawful and peaceful means to induce others to refuse to work for such employer, are equally well founded (provided contracts of employment

society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily. But the social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice Barrett (*People v. Smith*, 5 N. Y. Cr. R., at page 513), 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of that rate.' Every citizen is deeply interested in the strict maintenance of the constitu-

tional right freely to pursue a lawful avocation under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion or a fettering of the individual glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the state. The sympathies or the fellow feeling which, as a social principle, underlies the association of workmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed towards the repression of individual freedom, upon what principle shall it be justified?" An act making it unlawful for an employer to forbid an employee from joining any trade union, also making it unlawful for an employer to require an employee to refrain from attending any meeting of any union, association or society, is unconstitutional. *State v. Julow* (1895), 129 Mo. 163, 31 S. W. R. 781.

are not broken), members of such association have no right, by force, menaces or threats, to attempt to prevent the members of any other association, or men who belong to no association, from working upon such terms as they are willing to accept; nor, on the other hand, have non-union workmen any right to use similar means to prevent union workmen from working upon such terms as they may agree upon with any employer; and when any number of men so conduct themselves as to commit a continuing trespass or become a nuisance, they are guilty of a conspiracy and may be enjoined by a court of equity.¹

§ 535. It is unlawful for workmen to collect in crowds about the establishment of an employer whose employ they have quit, and it is unlawful for them to follow workmen who have taken their places to their homes and interfere with them in passing along the public streets, for the purpose of intimidating or coercing them into quitting their employment; such course is a menace to the workmen and to the public peace.²

§ 536. It is unlawful for employees who are out on a strike to patrol the streets adjacent to employers' premises both day and night, and to keep within call at all times a large number of men for the nominal purpose of dissuading other workmen from taking the place of the striking employees, where it is clear from the circumstances that the patrolling was for the purpose of intimidating workmen seeking to enter the premises.³ This case was heard before Judge Hammond, who issued an order enjoining the striking employees from entering the grounds of complainant for the purpose of interfering with or obstructing its business in any manner, and from compelling, by intimidation, force or violence, any persons from entering the service of complainant, and "from collecting in and about the approaches to said complainant's American Mill or other mills for the purpose of picketing or patrolling or guarding the streets, avenues, gates and approaches to the property

¹ *Brace Bros. v. Evans* (1888), 18 P. 1 Dist. R. 622; *People v. Wilzig* J. L. (N. S.) 399, or 35 Pittsburgh L. (Theiss Boycott Case), 4 N. Y. Cr. R. J. (O. S.) 399; *McCandless et al. v.* 403.

O'Brien, 21 P. J. L. (N. S.) 435, or 38 ² *Murdoch et al. v. Walker et al.* (1893), 152 Pa. St. 595, 25 Atl. R. 492.

Walker et al. (1893), 152 Pa. St. 595, ³ *American Steel & Wire Co. v. Wire Drawers' Unions*, 90 Fed. R. 608.

of the American Steel & Wire Company for the purpose of intimidating, threatening or coercing any of the employees of complainant, or any person seeking the employment of complainant; and from interfering with the employees of said company in going to and from their daily work at the mill of complainant. And defendants, and each and all of them, are enjoined and restrained from going, either singly or collectively, to the homes of complainant's employees, or any of them, for the purpose of intimidating or coercing any or all of them to leave the employment of the complainant or from entering complainant's employment, and, as well, from intimidating or threatening in any manner the wives and families of said employees at their said homes."¹

¹ In support of his position Judge Hammond cited the following authorities, saying: "It only remains to cite the cases which establish this protection for the plaintiffs and their substituted laborers beyond all controversy. But I wish to say particularly that this case is undeniably, in my judgment, supported most substantially by the dissenting opinions of Mr. Chief Justice Field and of Mr. Justice Holmes in the Massachusetts case, which was so earnestly relied on in the argument for the defendants; and I should think it would come within the most recent opinion of Judge Valliant in the Missouri case, a note of which was read, with commendation by counsel, from the Albany Law Journal. But the Debs case, by the supreme court of the United States, is all-sufficient for every court. It settled every suggested defense against the defendants, and the writ of injunction approved in that case could be adopted almost *verbatim* in this, *mutatis mutandis*. In *re Debs*, 158 U. S. 564, 15 Sup. Ct. 900; *Id.*, 64 Fed. R. 724; *United States v. Kane*, 23 Fed. R. 748; *Casey v. Typographical Union*, 45 Fed. R. 135; *Cœur D'Alene Consol. & Min. Co. v. Miners' Union*, 51 Fed. R. 260; *T., A. A. & N. M. Ry. Co. v.*

Penn. Co., 54 Fed. R. 730, 746; *United States v. Workingmen's Amal. Council of N. O.*, 54 Fed. R. 994; *Blindell v. Hagan*, 54 Fed. R. 40; *Id.*, 6 C. C. A. 86, 56 Fed. R. 696; *Farmers' Loan & T. Co. v. N. P. R. Co.*, 60 Fed. R. 803; *Thomas v. Railway Co.*, 62 Fed. R. 804; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. R. 310; *United States v. Elliott*, 64 Fed. R. 27; *Ex parte Lennon*, 12 C. C. A. 134, 64 Fed. R. 320; *United States v. Alger*, 62 Fed. R. 824; *Oxley Stave Co. v. Coopers' Int. Union of N. A.*, 72 Fed. R. 695; *Id.*, 28 C. C. A. 99, 83 Fed. R. 912; *Elder v. Whitesides*, 72 Fed. R. 724; *Wire Co. v. Murray*, 80 Fed. R. 811; *Mackall v. Ratchford*, 82 Fed. R. 41; *Railway Co. v. McConnell*, 82 Fed. R. 65, and note, p. 87; *Moore v. Bricklayers' Union*, 23 Wkly. Law Bul. 48; *Vege-lahn v. Guntner*, 44 N. E. R. 1077; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. R. 307; *Murdock v. Walker*, 152 Pa. St. 595, 25 Atl. R. 492; *China Co. v. Brown*, 164 Pa. St. 449, 30 Atl. R. 261; *Crump's Case*, 84 Va. 927, 6 S. E. R. 620; *Barr v. Council*, 53 N. J. Eq. 101, 30 Atl. R. 881; *State v. Stewart*, 59 Vt. 273, 9 Atl. R. 559; *People v. Wilzig*, 4 N. Y. Cr. R. 403; *Cogley, Strikes*, 256; *Reynolds v. Everett*, 144 N. Y. 189, 39 N. E. R. 72; *Curran v. Galen*, 152 N. Y. 83, 46 N. E. R. 297;

§ 537. A combination or union may appoint a committee to visit factories for the purpose of reporting to the union the number of workmen employed in each factory and the addresses of such workmen, provided such information can be legally obtained.¹ Pickets may be established about factories and places where non-union men are employed, providing the number of pickets is not so great as to overawe or intimidate the non-union workmen, or in any manner obstruct the street or sidewalk, and providing the so-called "pickets" confine themselves to the use of persuasion or argument with the non-union employees; but if the watching or picketing is carried to an extent which causes intimidation, or amounts to coercion, compulsion or molestation in any form of either the non-union workmen or their employers, it is unlawful, and the combination making use of such unlawful means is a conspiracy.² Neither a union nor its members will be enjoined for merely voting to establish a "picket" about factories by stationing men in the neighborhood whose sole purpose is to report the number of employees engaged in the factories.³

§ 538. Strikers have not the right to assemble in front of a factory in such numbers as to constitute intimidation. There may be such jeering and shouting at employees as to intimidate; and picketing may be done in such numbers as to constitute intimidation. Wherever strikers assume towards other

Shoe Co. v. Saxly, 131 Mo. 212, 82 S. W. R. 1106; Marks v. Paft, 58 Alb. Law J. 112, note; S. S. Co. v. McGregor (1892), App. Cas. 25; Allen v. Flood (1898), App. Cas. 1." See also Lyons v. Wilkins (1896), 65 L. J. Chan. 601, decided by the English court of appeal December 20, 1898.

As regards another consideration urged by counsel, Judge Hammond spoke as follows: "Very much was said in argument about the Turks, Armenians and Polacks employed as substituted workmen by the plaintiff, but the facts show that it has little foundation in fact, and should have not the slightest influence on this question, if it were true. There is no distinction in this country in the legal rights of classes based on

race or nationality, and all stand upon an equal footing in this respect. Foreigners are no longer treated as outlaws or barbarians by any civilized nation, and, if racial distinctions were to be considered in this case, there is a very beggarly show of Americans or Anglo-Saxons; and both the strikers and the strike-breakers are a rather conglomerate congregation of many races, except the negroes, who are conspicuous by their absence."

¹ Perkins et al. v. Rogg et al. (1892), 28 Cin. Wkly. Law Bul. 32.

² Perkins et al. v. Rogg et al. (1892), 28 Cin. Wkly. Law Bul. 32. See note in 18 Cent. Law Jour. 200.

³ Perkins et al. v. Rogg et al. (1892), 28 Cin. Wkly. Law Bul. 32.

employees an attitude of menace, then persuasion and entreaty, no matter how smooth the words, may constitute intimidation which will render those who use such means liable both civilly and criminally.¹

§ 539. But the offense of picketing must not be confounded with the entirely distinct offenses of obstructing the highways or committing other nuisances. If the street or highway leading to a place of business is so obstructed by a mob that access to the premises is materially interfered with and damage thereby results, this is an offense of an entirely different nature from that of picketing. Picketing does not necessarily involve the obstruction of the highway. A single picket may be as detrimental to the rights of others as a hundred, and wherever the courts have attempted to pass upon the legality of picketing by estimating the extent of the wrongdoing by the number of the pickets maintained, the inevitable result has been confusion in the reasoning and conflict in the conclusions reached.

A picket is the agent of a combination, and the legality or illegality of the maintenance of a picket has absolutely nothing to do with the number of pickets employed, but depends upon the objects of the combination and the means used by the picket to attain the objects. If the object of the combination is simply to notify parties seeking employment that a strike is on, and

¹ Rogers et al. v. Evarts et al. (1891), 17 N. Y. Supp. 264. "It may be impossible to lay down a general rule as to what surrounding circumstances will characterize persuasion and entreaty as intimidation. Each case must probably depend upon its own surroundings. But where the evidence presents such a case as to convince the court that the employees are being induced to leave the employer by operating on their fears rather than upon their judgments or their sympathy, the court will be quick to lend its strong arm to his protection. Rights guaranteed by law will be enforced by the courts, whether invoked by employer or employee." From opinion of court in case last cited. As regards the contribution of money to support strikers the court said: "The offer by de-

fendants of money to pay expenses of the employee is lawful. The assistance given to those needing it is lawful, even if offered as an inducement to the employee to leave. It is only a just provision to those who have surrendered their wages, perhaps from sympathy for defendants. The posting of names of those who contribute to funds sought and lawfully used for sustaining the strike and of those who refuse to contribute is lawful as long as the strikers keep within the law. If, however, their purpose be an unlawful one, and not for an advance of wages, or if they seek to accomplish a lawful end by unlawful means, then they are guilty of illegal conspiracy, and the posting of the names of contributors and non-contributors is a part of such conspiracy and unlawful."

to persuade them by peaceful and lawful arguments not to take the places of the striking workmen, then the picket is not illegal, and it is quite immaterial whether there be one picket or many. If, however, the object of the combination in maintaining the picket is to intimidate other workmen and thereby prevent their finding employment, the picket is illegal whether there be one or many.

In determining the object of the combination the courts will probe deeper than resolutions and mere professions of good will and lawful intentions. It unfortunately happens that there is seldom a case where a picket is maintained that the members of the picket or their hangers-on do not resort to acts of violence, and to jeers, cries, epithets and threats calculated and intended to intimidate workmen who are not members of the combination. So true is this that the very term "picket" has come to mean in the popular mind threats, violence and intimidation. It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket under the most favorable consideration means an interference between employer seeking employees and men seeking employment. Furthermore, it is plain that without intimidation of some character workmen who are not members of the combination, and who will not be benefited either directly or indirectly by the success of the combination, would hardly be dissuaded from taking the employment offered by any arguments that a picket could use. If, however, the picket is maintained for the purpose of persuading workmen seeking employment to join the union so as to participate in whatever benefits may result from the success of the union in the controversy, and no intimidation of any character, direct or indirect, is resorted to, either for the purpose of compelling the non-union men to join the union or frightening them away from seeking work, then such picket would be of a lawful character.¹

¹ In a comparatively recent English case (Lyons et al. v. Wilkins (1896), 65 L. J. R. Ch. Div. 601) an injunction was sought against the "picketing" of certain premises by striking labor union men. Concerning the effects

§ 540. The boycott — Definition of.— The “boycott” is a conspiracy the direct object of which is to occasion loss to the party or parties against whom the conspiracy is directed; and the means commonly used is the inducing of others to with-

of the picketing the court said: “The consequence of these proceedings is that the trade union are, in effect, preventing the plaintiffs from carrying on their business upon such terms as they may choose to arrange. Of course one sees the difficulty in which all trade unions are placed. Strikes, which were formerly considered illegal, have now been legalized, and trade unions, which were formerly considered illegal, have now been legalized—at all events so far as all the doctrines as to restraint of trade are concerned,—and a strike can now be conducted up to a certain point with perfect legality; that is to say, persons cannot only decline individually to work for a master except upon terms which the workmen desire to obtain, but they can combine to do that. They can combine to leave him; they can strike unless he will raise their wages up to what they desire. And trade unions which assist them in withdrawing their own labor and declining to work, and which assist them in supporting themselves during the strike, can legally do so. Then comes this difficulty, which is as well known to those who conduct trade unions as it is to the masters and to all persons who have experience in these disputes. If that is all that the workmen who are striking can do, they may be defeated by the masters making arrangements with other people who will be willing to work for them, either by taking the work away or working for less wages than the strikers think is right; and unless strikers can stop that their strike may be ineffective. There comes the struggle. Now parliament has not

yet conferred upon trade unions the power to coerce people, and to prevent them from working for anybody upon any terms they like; and yet, in the absence of such a power, it is obvious that a strike may not be effective, and may not answer its purpose. Of course it depends on circumstances. Some strikes are perfectly effective by virtue of the mere strike, and other strikes are not effective unless the next step can be taken, and unless other people can be prevented from taking the place of the strikers. That is the pinch of the case in trade disputes, and until parliament confers on trade unions the power of saying to other people, ‘You shall not work upon terms which you shall agree with those who are desirous of employing you,’ trade unions are exceeding their power when they take steps and endeavor to exercise such compulsion to compel people not to work on any terms that they may choose to make. I need hardly say that up to the present moment any such power as that does not exist. By the law of this country, as it has been established immemorially, no one has that right, no one has that power; no set of people have that power.”

In this particular case the “pickets” were established in relays of two, and they were put there to coerce the employers by persuading workmen not to enter their employment.

This case was affirmed on appeal by Lindley, M. R., Chitty, L. J., and Vaughan Williams, L. J., 68 L. J. R. Ch. Div. 146.

The following note from 18 Cent. Law Jour., page 200, is of interest in

draw from such party or parties their patronage and business intercourse by threats that, unless they so withdraw, the members of the combination will cause, directly or indirectly, loss of a similar character to them.¹

this connection: "A rather important question arose in a recent case in the New York city court. The suit was one for illegal arrest. The defendant had arrested the plaintiff, a striking cigar-maker doing picket duty, for intimidating another maker from going to work. Chief Justice McAdam in charging the jury laid down the law to be that 'any orderly body of men have the legal right to meet and discuss any question concerning their social or pecuniary welfare, and take any action in respect thereto which they deem beneficial, so long as it does not involve or tend to create a breach of the public peace; that the plaintiff had the legal right to decline to work for his employer, unless the latter consented to pay the wages the former demanded; that he had the right to invite others to join him in the course he had determined to pursue, to accost workmen in the street or elsewhere and invite them to follow his example or join the union, and if in the exercise of these rights he was wrongfully assaulted and maltreated by the defendant he is entitled to a verdict in such sum as will compensate for the wrongs done. But if he undertook to enforce his rights in an illegal manner, used violence or threatened workmen who declined to think and act as he did, the defendant, as a police officer, had the right to protect the workmen so threatened, and had the power to prevent any threatened breach of the peace, and to use whatever force was necessary to accomplish this object. But if the officer used unnecessary violence he is liable therefor as an abuse of authority."

¹ *T. A. A. & N. M. Ry. Co. v. Pennsylvania Co.* (1893), 54 Fed. R. 730. In this case Judge Taft said:

"As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, *i. e.*, with the intention to injure another without lawful excuse." See also *Casey v. Typographical Union No. 3 et al.* (1891), 45 Fed. R. 135, and *Oxley Stave Co. v. Coopers' Int. Union of N. A. et al.* (1896), 72 Fed. R. 695.

In *Crump v. Com.* (1888), 84 Va. 927, 6 S. R. 620, the supreme court of Virginia speaks as follows of the "boycott:" "For a legal definition or explanation of the meaning and practical effect of the cabalistic word, as well as for a pertinent exposition of the law applicable to the facts of this case, we refer to the ad-

In brief, a "boycott" is the wilful and intentional infliction of injury in order to attain some object. The immediate object is the infliction of the injury; the ultimate object is usually the attainment of some given end, such as the increase of wages, the lowering of rents, shorter hours of work, etc. A combination is, of course, essential to the establishment of a boycott. For an individual to announce that he will no longer trade with a given merchant or manufacturer, and to request the public to likewise refrain, would be futile. It is otherwise, however, when a powerful organization passes resolutions to no longer trade with a particular merchant, or use the goods of a particular manufacturer, and also requests the public to refrain. The attempt is made to make the latter request effective by notifying other merchants and manufacturers that if it is discovered that they are trading with the party against whom the boycott is announced they will also be boycotted. Of late years the strength of the boycott has been so frittered away that it now has few terrors for either merchant or manufacturer. In fact it has been so abused and so oppressively and maliciously used that it is quite probable that any reputable manufacturer or

mirable opinion of Judge Wellford of the circuit court of the city of Richmond, in the case of *Baughman Brothers v. Askew*, Va. Law J., April, No. 196, and also to the decision of the supreme court of Connecticut in the case of *The State v. Glidden*, 55 Conn. 76. In that case the court says: We may gather some idea of its (boycotting) real meaning, however, by a reference to the circumstances in which the word originated. Those circumstances are thus narrated by Mr. Justice McCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority: 'Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark, in the wild and beautiful district of Connemara. In his capacity as agent he had served notice upon Lord Earne's tenants, and the tenantry suddenly retaliated, etc., etc. His life appeared to be in danger; he had to

claim police protection. To prevent civil war the authorities had to send a force of soldiers and police to Lough Mark, and Captain Boycott's harvest was brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army.' The court proceeded to say: 'If this is a correct picture, the thing we call a *boycott* originally signified violence,—if not murder. But, even here, if it means, as some high in the confidence of the trade unions assert, absolute ruin to the business of the person *boycotted*, unless he yields, then it is criminal.' The essential idea of boycotting, whether in Ireland or the United States, is a confederation, generally secret, of many persons, whose intent is to injure another, by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution and vengeance of the conspirators."

merchant against whom a boycott is announced finds his trade actively increased by new customers who are not in sympathy with the indiscriminate and oppressive use of boycotts.

§ 541. Malicious injury to the business of another is actionable.¹ It is a criminal conspiracy for parties to combine together with the object of preventing any person from carrying on his or her legitimate business by watching and besetting the place of business, interfering with and intimidating employees, and by spreading broadcast threatening notices, hand-bills and circulars with the intent to divert customers and break up trade.²

¹Keeble v. Hickeringill, 11 East, 574; Gunter v. Astor, 4 Moore, 12; Lumley v. Gye, 2 El. & Bl. 216; Young v. Hichens, 6 Q. B. 606; Temperton v. Russell (1893), 1 Q. B. 715; Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Van Horn v. Van Horn, 52 N. J. Law, 284, 20 Atl. R. 485; S. C., 28 Atl. R. 669; Lucke v. Assembly, 77 Md. 396, 26 Atl. R. 505; Curran v. Galen, 22 N. Y. Supp. 826; Bradley v. Pierson, 148 Pa. St. 502, 24 Atl. R. 65; Ryan v. Brewing Co., 13 N. Y. Supp. 660; Moores v. Union, 23 Wkly. Cin. Law Bul. 48; Delz v. Winfree, 16 S. W. R. 111; Olive v. Van Patten (Tex. Civ. App.), 25 S. W. R. 428; Jackson v. Stanfield (Ind.), 36 N. E. R. 345; Railroad Co. v. Greenwood (Tex. Civ. App.), 21 S. W. R. 559; Chipley v. Atkinson, 23 Fla. 206, 1 S. R. 934; Haskins v. Royster, 70 N. C. 601; Bixley v. Dunlap, 56 N. H. 456, 22 Am. R. 475, note; Mapstrick v. Range, 9 Neb. 390, 2 N. W. R. 729.

²People v. Kostka et al. (1886), 4 N. Y. Crim. R. 429. In this case Judge Barrett charged the jury that workmen "may co-operate to improve their condition and to increase their wages, they may refuse to work for less than the price they have jointly fixed, and they may do everything that is lawful and peaceable to secure that price. They may even go to their brethren and beseech them not to work for less than the fixed

rate. They may use all fair arguments to prevent acceptance of less than the agreed standard of wages. All this they may lawfully do. Argument, reason and entreaty are lawful weapons. But the moment they go beyond these means and threaten to punish him whom they believe to be their erring brother, threaten him with violence should he stand in the way of their success by accepting a lower rate than that fixed by the co-operators, they bring themselves face to face with the law. Up to that point of threat or violence they may do what they please, and public opinion says 'Heaven speed you.' But at that point they must stop. Now, in the present case, did these defendants overstep the just and lawful line? Did they, no matter what their end, whether good or bad, seek to prevent this woman, Landgraff, from exercising her lawful trade or calling by intimidation? Let us see precisely what they did. We have evidence that on the night which preceded the first distribution of circulars, some eighteen men (three at least of the accused being among them) went to her bakery and a dispute of some kind ensued. There is testimony to the effect that one of the eighteen threatened to kill one of her bakers; also to the effect that some of the eighteen spat in the faces of some of her bakers and committed other acts

§ 542. A person's business is his property and he is entitled to protection from unlawful interference therewith. Every person has a right to carry on his legal business according to his own discretion, and to employ therein any means which

of violence. It is fair to say that there is also some testimony on the part of the defense contradicting this testimony and denying these acts. It is for you (who are the sole judges of the facts) to say whether you believe the testimony of the witnesses who tell us that threats were made and violent acts committed. If you believe this testimony and credit the commission of acts of violence, then we come back to what took place next morning, namely, the distribution of the circulars which have been read in evidence before you. You may consider, upon this question of intimidation, the fact that the distribution of these circulars was not an isolated act, but was repeated three days in succession, each day with an increased staff of distributors, until upon the last day the number has increased to fifteen persons. You may also consider the character of these circulars and the language used in them. You will notice that they commence quite gently, invoking the moral support of their fellow-citizens. In later paragraphs, however, they speak of having been subjected to violence and insult. You may look through these circulars and see whether they contain appeals to passion or otherwise inflammatory in their character. You may also consider the distribution in the light of what occurred the night before. You will remember that one of the witnesses testified that Linhard said, the night before the distribution of the circulars, to the baker whose life was threatened, that if he, that baker, would come outside, he would in substance feel the weight of his, Linhard's, displeasure. Suppose that

baker had come outside when these circulars were being distributed, what would have happened? Do you feel, upon the whole, that if that baker had come outside, during the distribution of circulars, he would have been molested? The mere fact that no violence was actually used in the street is not conclusive. It is for you to say whether the attitude of these men was threatening. Nor is it necessary that there should have been a direct threat. If you believe that the attitude actually presented by the distribution of those circulars was an attitude of intimidation, either to the passers-by or to the woman inside (Mrs. Landgraff), considering all the circumstances, then all who participated in it, directly or indirectly, are within the meaning of that word 'intimidation,' as used in the conspiracy act. I need not say to you that if that be the truth of the case, these people cannot escape because they may not have succeeded in punishing Mrs. Landgraff to the extent which they hoped. It is the conspiracy to prevent the exercise of a lawful calling by means of intimidation, with overt acts of an unlawful character, which constitute the crime, and although a thousand citizens might come forward, and, because of their indignation against the attack upon the woman, enrich her out of their own personal funds, the wrong-doers cannot avail themselves of this kindness, or right feeling, or charity, as a shield against the consequences of criminal acts. Has then a conspiracy to injure this woman's business, to prevent the exercise of a lawful calling by means of intimidation, been established to

are safe, healthful and lawful, and to employ such persons as he may select; and it is the duty of all other persons to refrain from obstructing any party in the exercise of these rights.¹

§ 543. Where members of a typographical union had a controversy with the proprietor of a newspaper, and the union withdrew its indorsement of the paper and reported the matter to a trades council which was made up of various trades unions, and such trade council issued a circular calling on all friends to boycott the paper and to cease buying the paper and advertising in it, such acts are actionable, and a court of equity will interfere by injunction to prevent an injury which threatens irreparable damage or a continuing injury where the legal remedy may involve a multiplicity of suits.² In the case just cited the proprietors of the newspaper sought an injunction, and the supreme court of New Jersey said: "It thus clearly appears that an injury to the complainant's business, in circulating and advertising, resulting from the acts of the defendants, comprising a large number of persons and associations acting in concert, has not only been inflicted, but threatens to be continued. Is this illegal on the part of the defendants? Not in the sense of being criminal and punishable as such; for, in my judgment, the case does not, as seems to be assumed by some in similar cases, require an expression of opinion on that point, for two reasons: First. The jurisdiction of the criminal and civil remedies for acts the result of a conspiracy spring from different sources; for while the statute, in the former, now requires an overt act, at common law the act of conspiring constituted the crime. On the other hand, the injury done

your satisfaction? If it has, then the question remains, can a number of men so combine to so injure and to so prevent the exercise of a lawful calling, not by personal solicitation in a general way but by congregating in numbers near the doors of the person to be injured, by printing circulars descriptive of the supposed grievances in more or less emphatic language, and by distributing such circulars near and about his doors to his customers and to passers-by? If the conspiracy here be established

and the effect of the overt acts was to intimidate, and by such intimidation to warn off Mrs. Landgraff's customers and the general public which might otherwise patronize her and to intimidate her, then such of the defendants as so conspired and participated in the overt acts are guilty."

¹ Barr et al. v. Essex Trades Council et al. (1894), 53 N. J. Eq. 101, 30 Atl. R. 881.

² Barr v. Essex Trades Council et al., *supra*.

intentionally and without legal excuse, or maliciously, is the gist of the civil remedy. Second. And, as a consequence, while it is a short, proper and effective way to dispose of a claim of defendants that their act was in the exercise of a legal right, to show that it was criminal, the jurisdiction of this court to interfere by injunction cannot be based on any such conclusion but must arise from conditions which involve well-established grounds of equity jurisdiction. When, therefore, the question is here asked if causing the injury to the complainant's business is illegal, it is meant is it an actionable wrong? That is, has the complainant a remedy by civil action against the defendants therefor, or are the defendants privileged to do the acts charged, in the manner and under the circumstances complained of, even though the natural result thereof be an injury to complainant's business? On the solution of this question depends the claim of the defendants that they have acted within their legal rights. No unprejudiced person at this day wishes to place any obstacle in the way of labor organizations conducting their operations within lawful limits. It is unfortunate that, despite the warning and counsel of accredited leaders, the reckless and revengeful among the members, with the vicious and lawless always to be found among the idle, so often take advantage of labor demonstrations to commit acts of violence against persons and property, and thus weaken the sympathy of the public with the system. Yet every one must acknowledge that organization has accomplished much in the past for the benefit of the workingman, and recognize its possibilities to secure to them in the future the enjoyment of other privileges. But, while engaged in this laudable purpose, those who give direction to affairs should not attempt to secure their ends by infringing the lawful rights of others. When they are accused of so doing, it is the province of the courts, when the question is properly presented, to define and protect the rights of those brought within their jurisdiction. In discharging this duty, judges can only decide on established principles and rules, and are not empowered to create rights or initiate new powers or privileges. That is a legislative, not a judicial function. It would seem to be unnecessary to state such elementary truths, were it not that other views appear to be entertained by some. The defendants claim, and they are entitled to be

credited with being sincere in the contention, that they believe they have, in all matters complained of, acted strictly within the lines of their legal rights. This position justifies us in assuming that if they had not believed so, and had not been satisfied they were correct in law, the acts challenged would not have been committed, and, if now convinced they are wrong, will not again be attempted.”¹

¹ Referring to the necessity for freedom of action in the legitimate conduct of business, the court said: “This freedom of business action lies at the foundation of all commercial and industrial enterprise. Men are willing to embark capital, time and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them, if the courts cannot protect them from interference by those who are not interested with them, if the management of business is to be taken from the owner and assumed by, it may be, irresponsible strangers, then we will have to come to the time when capital will seek other than industrial channels for investment, when enterprise and development will be crippled, when interstate railroads, canals and means of transportation will become dependent on the paternalism of the national government, and the factory and the workshop subject to the uncertain chances of co-operative systems. The acts of the defendants directly infringe upon the exercise of this right by Mr. Barr. True, explicitly in words they recognize the right, and protest earnestly that they have no wish to interfere with him in the management of his business with such means as he may select; but is it not perfectly apparent that the only purpose of the movement is to force him to abandon his determination to use

plate matter in the make-up of his newspaper? Certain members of Typographical Union No. 103 who were employees of his newspaper office abandoned his employment. This they had a perfect right to do under the law. No man can be required to work for another unless he so desires, and it is his right, outside of contractual duties, to cease an employment which is distasteful to him, and, within the limit authorized by the statute of 1883, it is lawful for a number to combine to leave the service of their employer. If the defendants had stopped here they would have been clearly within the exercise of their legal rights. But the members of Typographical Union No. 103 were not content to stand on this right. They, through the Essex Trades Council, are affiliated with other unions, and aggregate a body in a single county of this state which boasts (and I have no doubt truly) of a purchasing power of \$400,000 a week. The bare declaration by the Typographical Union that it no longer recognized the Newark ‘Times’ was, according to Mr. Beckmeyer’s affidavit, sufficient, under this perfect organization, to render it incumbent upon every member of these different unions to withhold his patronage from it. Not only this, but by the passage of the resolutions mentioned by the different unions, and the distribution thereof among advertisers, a moral intimidation was brought to bear upon the latter to further cripple the paper, either by

§ 544. It was urged by the members of the Typographical Union that they had no intention to injure the business of the proprietor of the newspaper; that their only desire was to protect themselves. In response to this contention the court said: "If the injury which has been sustained or which is threatened is not only the natural but the inevitable consequence of the defendants' acts, it is without effect for them to disclaim the intention to injure. It is folly for a man, who deliberately thrusts a firebrand into a rick of hay, to declare, after it has been destroyed, that he did not intend to burn it. If a person deliberately discharges a loaded pistol at point-blank range directly at the person of another, it is useless for him to say that he did not intend to maim his victim. The law, as a rule, presumes that a person intends the natural result of his act; and this is true with reference to civil as well as criminal acts."¹

It has been well said that the word "boycott" in itself implies a threat. "In popular acceptation it is an organized effort to exclude a person from business relations with others by persuasion, intimidation and other acts which tend to violence, and they coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs." Judge Taft² says: "As usually understood, a 'boycott' is a combination of many

wholly withdrawing their advertisements, or by leaving spaces, a most effective method of calling attention to the fact that the paper was under the ban of organized labor. Why this action? It must have had a purpose. None of the different labor organizations, or the members thereof, except the Typographical Union No. 103, had or has any grievance against the complainant. Their action, in the language of the times, was purely sympathetic. As to the Typographical Union, its members had no complaint against Mr. Barr, except that he used certain appliances which were not acceptable to the union. He paid the wages fixed by, and employed only members of, the union. The withdrawal of certain of the members from his employment was solely because he chose to

use plate matter interdicted by the union, and it is plain if the complainant would forego his own judgment in the management of his business in this regard, and comply with the wishes and determination of the Typographical Union with reference thereto, all matters being as they were, the whole difficulty would be at an end. To effect this purpose, therefore, the Typographical Union, through the Trades Council, enlisted the co-operation of the other organizations in an attempt to so impair the success of the newspaper that the complainant would be forced to accept the alternative proposed rather than sustain the loss."

¹ *Barr v. Essex Trades Council et al., supra.*

² *Toledo, etc. Ry. Co. v. Penn. Co.,* 54 Fed. R. 730.

to cause a loss to one person, by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them.”¹ “But the defendants insist, and counsel vigorously urge, that this particular boycott is not open to such adverse criticism, because ‘there was no violence, intimidation, coercion or threats used, and that everything was done in a peaceful and orderly manner.’ How far is this claim borne out by the facts? It is true there was no public disturbance, no physical injury, no direct threats of personal violence, or of actual attack on or destruction of tangible property, as a means of intimidation or coercion. Force and violence, however, while they may enter largely into the question in a criminal prosecution, are not necessary factors in the right to a civil remedy. But, even in criminal law, I do not understand that intimidation, even when a statutory ingredient of crime, necessarily presupposes personal injury or the fear thereof. The clear weight of authority undoubtedly is that a man may be intimidated into doing, or refraining from doing, by fear of loss of business, property or reputation, as well as by dread of loss of life, injury to health or limb; and the extent of this fear need not be abject, but only such as to overcome his judgment, or induce him not to do or to do that which otherwise he would have done or have left undone.”²

§ 545. Differences having arisen between a firm of laundrymen and their employees, certain combinations known as the Knights of Labor and the Trades Assembly demanded that the employees be reinstated, threatening that if they were not they would injure and perhaps ruin the business of the firm. Afterwards circulars were issued charging the firm with abusive treatment of its employees and asking all persons to cease patronizing it, and announcing a boycott against the firm. Signs were put up and men followed the wagons of the firm in buggies having banners attached announcing the boycott, and men were posted in front of the place of business distributing circulars, and collecting together in large and noisy crowds, which interfered with the business. Action was brought against

¹ *Brace v. Evans* (1888), 3 Ry. & Corp. L. J. 561; *Railway Co. v. Penn. Co.*, 54 Fed. R. 746. ² *Barr v. Essex Trades Council et al.*, *supra*.

parties to the combination to recover damages occasioned, and the combination was held to be a conspiracy, the court saying: "The plaintiffs' business is not only lawful, but is beneficial to the community. Their right to continue it is beyond question, and it is not one that need be established by an action of law. It is based upon the fundamental right to life, liberty and the pursuit of happiness, which are recognized by the first clause of our bill of rights, which declares that 'all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.' It is a right of which he cannot be deprived by law, and which he cannot relinquish voluntarily; for, though any person may contract not to work in a particular calling within a limited district and for a limited time, he cannot bind himself not to work for an indefinite time in all places. This is because of the public interest in the labor of every citizen."¹ After referring to the Pennsylvania statutes authorizing combinations of workingmen, the court continued: "But the intent of these statutes was merely to relieve the persons committing the acts specified from the penalties of crime. Because they are declared not to be criminal, and the perpetrators are relieved from criminal prosecution, does not make them lawful. There are many acts which are unlawful which are not criminal. Trespass upon real estate is unlawful; it is not criminal. Waste is unlawful; it is not criminal. And yet those may be the subject of equity jurisdiction. So the acts referred to in these statutes may be unlawful because they injuriously affect the rights of individuals, notwithstanding they are divested of their criminal character. The legislature did not intend to deprive any citizen of legal redress for any injury sustained by the acts referred to. It has no power to do so if it had so intended. The eleventh section of the bill of rights declares that 'every man for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.' If, therefore, the legislature should enact that violence done to personal property should not be indictable, it

¹ Citing *Gompers v. Rochester*, 56 Pa. St. 194; *Harkinson's Appeal*, 78 Pa. St. 196.

would not deprive the injured party of his redress by appropriate remedies, legal or equitable. It will be further observed that the defendants are not employees of plaintiffs, and never were, nor have they any connection with or interest in their business. They claim to be acting as representatives of a joint committee of the Trades Assembly and Knights of Labor, and on behalf of members of that order. They are not attempting to persuade the employees of plaintiffs to leave their employment, either by peaceful means or by violence and threats. Their action is directed to the patronage of plaintiffs and their agents, and intended to procure the withdrawal of patronage from plaintiffs. These acts and purposes are not contemplated or covered by the statutes. It therefore follows that in this case the rights of the plaintiff are not affected by these acts of assembly. They must be determined by principles wholly independent of their provisions.”¹

§ 546. It is a conspiracy for a labor union to coerce an employer into discharging a non-union man who is performing the duties of his position to the satisfaction of his employers, by threatening that if the non-union employee is retained the union will notify all labor organizations of the city that the firm of employers is a non-union firm, and thereby subject them to loss and damage; such interference by a labor union is wrongful, and action will lie against it by a non-union employee for damages sustained.²

In the case last cited the plaintiff was a cutter employed in a certain tailoring establishment in the city of Baltimore. His employers were satisfied with his work, and assured him that they would retain him in their service as long as he might choose to remain. Shortly after one of the members of the firm called plaintiff's attention to the fact that certain members of the Clothing Cutters' & Trimmers' Assembly objected to his

¹ *Brace Bros. v. Evans et al.*, 3 Ry. & Corp. L. J. 561.

² *Lucke v. The Clothing Cutters' & Trimmers' Assembly* (1893), 77 Md. 396, 26 Atl. R. 505. The supreme court of Maryland decided that section 37 of article 23 of the Maryland code, authorizing the formation of trades unions “to promote the well

being of their every-day life, and for mutual assistance in securing the most favorable conditions for the labor of their members, and as beneficial societies,” did not legalize war upon non-union workingmen by illegal interference with their rights and privileges.

employment on the ground that he was a non-union man; thereupon he expressed his willingness to become a member of the union, and he made his application in the usual way; but he was denied admittance on the ground that too many union men were out of employment and the union had passed a resolution not to accept any more members, and that such resolution was the only reason why they denied plaintiff's application.¹

The plaintiff was a married man, and after his discharge endeavored to obtain work, but it was impossible for him to secure a position with any of the clothing houses or merchant tailors, and it was not until the following April that he obtained employment, and then at a salary of \$5 a week less than he had been receiving prior to his discharge.²

The court below took the case from the jury on the ground that there was no evidence legally sufficient to entitle the plaintiff to recover. The supreme court stated the issues as follows: "There are several inquiries which arise out of the facts just stated: *First*. Had the appellee justifiable cause in

¹ The following correspondence passed between the union and the employers:

"CLOTHING CUTTERS AND TRIMMERS,
"L. A. 7507, K. of L.
"Baltimore, February 16, 1892.

"MESSRS. ROSENFELD BROS.

"*Gentlemen*:—Clothing Cutters and Trimmers, L. A. 7507, K. of L, do herewith desire to inform you that in case the non-union man whom you have in your employ is any longer retained, we will be compelled to notify all labor organizations of the city that your house is a non-union one. Trusting you will give this matter due consideration,

"We are respectfully yours,

"CLOTHING CUTTERS AND TRIMMERS,
"L. A. 7507, K. of L.

"JNO. G. NAGENGAST, Secretary."

Upon receiving the said notice the said firm immediately notified plaintiff that he would have to go, and did in fact discharge him from their employ, at the same time notifying the Clothing Cutters' and Trimmers' As-

sembly of their action by sending them the following letter:

"OFFICE OF

"NEW YORK CLOTHING HOUSE,
"102 and 104 East Baltimore Street,
"Opposite Light Street,

"Baltimore, February 18, 1892.

"JOHN G. NAGENGAST, Esq.,

"No. 31 S. Washington, City.

"*Dear Sir*:—Your letter received, and your request will be granted; the gentleman referred to will be discharged Saturday night.

"Yours respectfully,

"ROSENFELD BROS.

"J. W. FREY.

"Cutters and Trimmers."

² "It was in proof by one of the Rosenfeld Brothers that the appellant was a first-class 'customs cutter;' that he 'filled the bill exactly;' and that their firm were entirely satisfied with him, and would not have discharged him but for the objection of the appellee; that they discharged him on account of the letter received from appellee dated Feb-

pursuing the course which it did in threatening said firm, that if they retained the appellant any longer in their employ it would be compelled to notify all labor organizations of the city that their house was a 'non-union house?' *Second.* Was the conduct of the appellee in the course pursued by it towards the appellant wrongful or malicious? *Third.* Had Rosenfeld Brothers reasonable ground to anticipate loss or injury to themselves in consequence of the action of the appellee?"

In discussing the issues as stated the court held broadly that the interference of the union was in law malicious and unquestionably wrongful; that it interfered with the most serious right affecting the laboring man's life, namely, the privilege of seeking remunerative employment and thereby gaining an honest livelihood; that it was the occasion of his discharge; that the interference of the union was wrongful, even if not actually malicious, and the legal rights of the plaintiff were invaded.

Furthermore, the court held that under the evidence the firm of employers had just cause to apprehend the consequences of a refusal to discharge plaintiff. "Courts are bound to look at things just as they are, to pass on facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention."¹

ruary 16th, and by letter dated February 18th they notified the appellee of the receipt of its letter, and stated that 'its request would be granted, and the gentleman referred to will be discharged Saturday night;' to which there was no reply by the appellee. Witness further proved that in his opinion, as a consequence of the failure of his firm to discharge the appellant, their patronage would have fallen off to the extent of organized labor, and that all the union cutters would have been ordered out, and that it would have gone still further than that; that not only the people who cut the material, but those that sewed on the work, would have been stopped from cutting or sewing for us, and if the union men

in our employ at the time the appellant was discharged had been called out, and left, the effect would have been to cause us great loss, as we had on hand at that time a number of contracts." *Id.*, p. 401.

¹ Citing *United States v. Kane*, 23 Fed. R. 750. The court continued: "Some criticism was indulged in in the argument of counsel in this court to the effect that a recovery could not be had in this cause, as the appellant had only declared on a supposed violation of a contract, when in point of fact there had been no contract violated. We concur in this view, and are clearly of opinion that the declaration sets out a cause of action which the proof fails to sustain. The question of a contract *vel*

“From the authorities referred to, and upon principle, it is apparent that neither the fact that the term of service interrupted is not a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself not a bar to an action against the third person maliciously and wantonly procuring the termination of, or a refusal to perform, the agreement. It is the legal right of the party to such agreement to terminate or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the former is willing and ready to perform it, it is not the legal right, but it is a wrong on the part of a third party maliciously and wantonly to procure the former to terminate or refuse to perform it. Such wanton and malicious interference for the mere purpose of injuring another is not the exercise of a legal right. Such other person who is in employment by which he is earning a living, or otherwise enjoying the fruits and advantages of his industry or enterprise or skill, has a right to pursue such employment undisturbed by mere ma-

non enters into the consideration of this case, but upon proper averment in the declaration ought to play but small part in its determination. ‘Where a contract would have been fulfilled but for the false and fraudulent representations of a third person, an action will lie against such person, although the contract could not have been enforced by action.’ *Benton v. Pratt*, 2 Wend. 385. In the case of *Johnston Harvester Co. v. Meinhardt*, 9 Abbott’s New Cases, 896, 897, the court said: ‘A distinction has been sought to be made between the cases where there has been an unexpired time contract, and cases where the services were by the day or by the piece, but I do not think such distinction rests upon any sound reason. . . . In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed, as in the loss of profits derived from the work of the laborer

if he continued in the employment, and the probability or certainty of such loss would be in each case a question of fact;’ and, of course, for the jury.”

The general principles governing cases of the character discussed have been stated as follows: “Interference by fraud or force with the free exercise of another’s trade or occupation, or means of livelihood, is a tort — such as preventing people, by the use of threats or intimidation, from trading with the plaintiff’s vessel in a foreign port, or dealing at the plaintiff’s shop, or sending their children to the plaintiff’s school, or placing obstructions or impediments in the way of free access to the plaintiff’s place of business. . . . Where a violent or malicious act is done to a man’s occupation, profession, or way of getting a livelihood, there an action lies in all cases.” *Addison on Torts*, Am. ed., 1876, vol. I, p. 13.

licious or wanton interference or annoyance. Every one has a perfect right to protect or advance his business if in so doing he infringes no superior legal right of another.”¹

“Merely to persuade a person to break his contract may not be wrongful in law or fact. . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury follows from it.”²

§ 547. But an injunction has been denied where it appeared that the executive committee of a typographical union, without license and without lawful business, entered the premises of a printing company and ordered all the union men employed therein to strike, under penalty of being dealt with in accordance with the laws and regulations of the union, which order was obeyed by the men; and where it also appeared that the committee of the members of the union circulated the fact that the employees of the printing company had been called out, and published an advertisement warning the public that the office of the printing company in question was a non-union office; and where it also appeared that the committee and members of the union induced the common council of the city to reject the bid of the printing company for the city printing; and where it further appeared that a boycott was instituted against the printing company,—the court in this particular case holding that it did not sufficiently appear that the damages were of such an irreparable nature as to warrant the intervention of a court of equity.³

¹ Chipley v. Atkinson, 23 Fla. 206.

² Bowen v. Hall, L. R. 6 Q. B. D. 338.

³ Longshore Printing Co. v. Howell, 26 Oreg. 527, 38 Pac. R. 547. Regarding the law generally the court said: “At one time, in England, it was maintained by some judges that trades unions were illegal combinations, and indictable at common law. In *Rex v. Mawbey*, 6 Term R. 636, Grose, J., by way of illustration, makes use of the following language: ‘As in the case of journeymen con-

spiring to raise their wages, each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.’ From a review of this case it is apparent that this language was not necessary to a decision of the points made. In *Hilton v. Eckersly*, 6 El. & Bl. 52. Crompton, J., in referring to *Rex v. Mawbey*, says that Grose, J., ‘assumed the illegality of such combinations as well-known law,’

§ 548. It may well be doubted whether the decision last referred to is sound. The facts disclosed a combination, the object of which was to oppress and injure a certain printing company, and one of the means to be used was a boycott, and

and further remarked that 'combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower, wages, were equally illegal.' But Lord Campbell, C. J., in a concurring opinion with Crompton, J., seriously doubted whether such was the law, and after citing *Rex v. Mawbey* said: 'I cannot bring myself to believe, without authority much more cogent, that if two workmen, who sincerely believe their wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, or liable to be punished by fine and imprisonment. The object is not illegal, and therefore, if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high; and I cannot understand why in the one case workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters, in the other, can be considered guilty of a crime in trying by lawful means to lower them.' And later English authorities concede that members of trades unions binding themselves not to work except under certain conditions, and to support one another in the event of being thrown out of employment in carrying out the views of the majority, do not bring themselves within the criminal law. *Hornby v. Close*, L. R. 2 Q. B. 153; *Farrer v. Close*, L. R. 4 Q. B. 602. Since the enactment of statutes 6 Geo. IV., ch. 129, as modified by 22

Vict., ch. 84, and 34 and 35 Vict., ch. 81, and similar statutes, trades unions are recognized as legal associations, with objects which they may endeavor to secure by pecuniary and other means of supporting strikes and the like, so long as they do not resort to secret or other violence, or to threats, intimidation or any acts of like character which will tend to destroy freedom of action. Early American cases are in consonance with the earlier English adjudications, but later authorities concur in the more reasonable and enlightened view that trades unions, in the ordinary acceptance of the term, are not within and of themselves unlawful combinations. 'It is no crime for any number of persons, without an unlawful object in view, to associate themselves together, and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions.' *Carew v. Rutherford*, 106 Mass. 14; *Snow v. Wheeler*, 113 Mass. 186; *Com. v. Hunt*, 4 Met. 111; *Rogers v. Evarts*, 17 N. Y. Sup. 268. It was therefore not unlawful for Multnomah Typographical Union No. 58 to adopt a scale of wages. Neither was it unlawful for the union to make provisions in its by-laws limiting the number of apprentices to one for each newspaper office employing less than twenty-five men, and two when employing twenty-five or more, and one to each job office, and two when employing five journeymen on an average. No member of this association can now be charged with criminal conspiracy as under the common law, simply because of the

as a matter of fact a boycott was successfully instituted. The court in its opinion concedes that "recent decisions sustain the doctrine that in a proper case, where two or more persons conspire and confederate together for the purpose of destroying

fact that he with others have combined for the purpose of maintaining wages or limiting the number of apprentices, as contrary to public policy."

Regarding the Oregon statute bearing upon the case the court said: "It is claimed in this case that the means employed by defendants were not permissible, and, being violative of the rights of the plaintiff, it is entitled to an injunction to prohibit their continuance. This brings us to the gist of the controversy. The statute provides (Hill's Code, 1893): 'If any person shall, by force, threats or intimidation, prevent or endeavor to prevent any person employed by another from continuing or performing his work, or from accepting any new work or employment; or if any person shall circulate any false written or printed matter, or be concerned in the circulation of any such matter, to induce others not to buy from or sell to or have dealings with any person, for the purpose or with the intent to prevent such person from employing any person, or to force or compel him to employ or discharge from his employment any one, or to alter his mode of carrying on his business, or to limit or increase the number of his employees, or their rate of wages or time of service, such person shall be deemed guilty of a misdemeanor,' etc.; and by section 1897 it is made a misdemeanor for any person to 'wilfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals.' Section

1748 provides: 'If any person, either verbally or by any written or printed communication, shall threaten any injury to the person or property of another . . . with intent thereby to extort any pecuniary advantage or property from such other, to do any act against his will, such person upon conviction thereof shall be punished,' etc. All these statutes are invoked in aid of plaintiff's contention. The first clause of section 1893 is directed against any person unlawfully preventing or endeavoring to prevent any person employed by another from continuing or performing his work. There are but two instances shown by the complaint in which the employees of plaintiff quit work. As to the first of these it is alleged: 'That the said executive committee, combining and conspiring as aforesaid, for the purpose aforesaid, and professing to act by authority of the union, and in the capacity of the officers of the same, without lawful business, entered the premises of the plaintiff and ordered all members of the said union there and then at work under contract with the plaintiff to cease work further for it, under penalty of being dealt with according to the laws and regulations of said union. Said workmen were intimidated and influenced thereby, and without delay immediately obeyed said unlawful and injurious order.' And as to the second instance, the complaint alleges: 'That on the twelfth day of March, eighteen hundred and ninety three, the then president of said union, and its members and officers, by a resolution of said union passed on that day, maliciously, and solely

or injuring the business of another, or doing violence to his property or property rights, and it is clearly made to appear that the injury is threatened and imminent and will become irreparable to the suitor, an injunction will lie to restrain the conspirators.”¹

But the court argues that the injuries, actual and threatened, in the case before them, were not such as to leave the printing company remediless in a court of law.²

The adequacy of the remedy at law in this case is open to

because plaintiff refused to submit to the said union, ordered all union men working for plaintiff to cease working for it, and the said workingmen, being intimidated by said order, did obey said order, and ceased to fulfill their contracts with plaintiff.’ In the one instance the men quit under an order from the executive committee, and in the other in pursuance of a resolution of the union. No intimidation is specifically alleged or shown, unless it can be inferred that by a refusal to quit the members of the union would subject themselves to the charge of insubordination to the order, and it does not appear that there was sufficient odium attached to this to put the members in fear or that compliance with the order and resolution was induced thereby. The more reasonable presumption is that they quit because of the mutual understanding between the members to abide the action of the union and its executive committee. The latter clauses of section 1893 can have no application here, as it is not alleged or claimed that the notice published in the ‘Oregonian’ and the one posted in numerous places were false.”

¹ The court cited *Brace v. Evans*, 3 Ry. & Corp. Law Jour. 561; *Cogley, Strikes & Lockouts*, 342; *Emack v. Kane*, 34 Fed. R. 47; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. R. 689, 17 N. E. R. 307; *Cœur d’Alene Min. Co. v. Miners’ Union*, 51 Fed. R. 260, 19 L. R. A. 382; *Casey v. Cincinnati*

Typographical Union, 45 Fed. R. 135, 12 L. R. A. 193; *T. & A. A. R. Co. v. Penn. Co.*, 54 Fed. R. 730, 19 L. R. A. 387; *Arthur v. Oakes*, 63 Fed. R. 327, 25 L. R. A. 414.

² *Longshore Printing Co. v. Howell*, 26 Oreg., on pp. 551, 552. And on page 555 the court said in conclusion: “The showing of plaintiff is clearly insufficient to bring itself within the rule thus explicitly stated by the learned judge. The plaintiff may have its action at law against defendants for some of the acts complained of, and defendants, or some of them, may have by their conduct subjected themselves to a criminal prosecution under the statute, and the plaintiff may have been much annoyed, and at times viciously harassed, by defendants; yet one thing is clear: there is no such persistent, aggressive and virulent boycott now in progress, nor was there at the time of the commencement of this suit, as to justify the court in saying that plaintiff’s business and property is being, or is about to be, destroyed or irreparably injured. We do not say that an injunction is an improper or unavailable remedy to stay the destructive and pernicious ravages of a boycott, but that in this particular case plaintiff has not brought itself within the rules of that particular jurisdiction of equity. The court below was right in sustaining the demurrer, and its decree in dismissing the complaint is affirmed.”

much doubt; the decision will hardly bear close analysis in the light of the authorities.

§ 549. **Slander and libel by labor organizations.**—It is libelous to falsely and maliciously publish a notice of any description charging a journeyman to be an inferior workman at his trade. It is also libelous to publish a notice of any kind or description maliciously charging that a man who holds himself out as a contractor is in the habit of employing inferior workmen, thereby imposing on parties for whom he does work as a contractor.¹

The law presumes that both employers and employees have the proper qualifications to do whatever work they lawfully undertake, and this presumption attaches under all conditions until the contrary appears in proof.²

If a labor union wilfully and maliciously publishes notices to the effect that workmen who are not members of the union are inferior workmen, or to the effect that contractors are employing inferior labor and thereby defrauding their customers, the union is liable for all damages occasioned thereby.³

¹ *Parker et al. v. Bricklayers' Union* (1889), 21 Cin. Wkly. Law Bul. 223.

² *Parker et al. v. Bricklayers' Union* (1889), *supra*.

³ *Parker et al. v. Bricklayers' Union*, *supra*. This case involved a controversy between a certain contracting firm and a bricklayers' union. The court laid down the following propositions in its charge to the jury: "If the defendants combined together to commit an act unlawful (either as in the sense of being criminal or in violation of plaintiffs' private rights, for which they would have a right of recovery in damages), or if they combined to do a lawful act by means of acts unlawful, then, in either such event, the combination is illegal. If men conspire together to do an unlawful act, or to do a lawful act by unlawful means, then one, knowing the purpose thereof, entering into such a conspiracy is bound by all the things said and done by any of their number in carrying out

the purpose of such conspiracy, so long as he remains therein and does not withdraw therefrom. The plaintiffs had the legal right to conduct their business of contracting bricklayers, by the purchase of their material of such persons as they deemed best, in the honest promotion of their trade and occupation. They likewise had the same freedom and right in the employment of their workmen, and, in fair competition with others of their trade, to obtain contracts for work. Likewise had the several workmen, members of the defendant union, in the honest purpose of looking to their individual welfare, the right to work for whom they preferred, and, if not under contract for stipulated time, to quit the service of any one and go to the service of another, or to rest from labor. And it is the province of law to protect all alike — the owner, the materialman, the contractor and the laborer, be they members of so-called

Any union, association or combination is liable for all damages occasioned if it is instrumental in depriving the parties injured of valuable business and contracts.¹

'unions' or not, be they skilled or unskilled. The law makes no distinction between them because of the service or occupation of either. Every man's labor and skill are his own property; often they are his sole dependence and means of support for himself and family, and they are his only certain and satisfactory means of accumulating property. It is essential to the laborer's welfare and manhood that he and his labor shall be free — the laborer, as the employer, who, very frequently, is only one step in the way of prosperity removed from the laborer for wages, has the same need for freedom for action in his field of service. Sometimes in their competition they come into conflict; but they must remember that each may, in the pursuit of his occupation, do whatsoever he will, only so long as it does not infringe on the equal freedom and right of the other. Workmen have the right to organize into unions for the common benefit of their members, for the purpose of advancing their skill, for mutual charities, and may bind themselves by rules, constitutions and by-laws within the scope of such purpose of organization. They may, for their own interests, make reasonable regulations as to how and whom they will instruct in the skill of their trade, and they cannot be compelled to teach others against their will. They may persuade others not to enter their trade; they may refuse to work with or instruct those not registered in their union; and they may, with an honest purpose, refuse to work with men obnoxious to their interests,

men expelled for reasons in good faith to them, or with men who refuse to join them, or refuse to work for any particular employer or contractor: they have a right to select their employers, and they may in combination refuse in good faith to work for any man justly obnoxious to them. They may, with like honest purpose to promote their united good, fix hours of labor per day and rate of wages, uniform or modified in rate, and they may encourage others to join their order. They may combine for the honest purpose of benefiting their order, by encouraging favorable terms to their employers in the purchase of material, and to procure contracts for such contractors as employ members of their union; but they become engaged in illegal enterprise whenever they agree to accomplish their purpose by threats, intimidation, violence or like molestation, either towards the apprentice, the expelled member, the non-union workman, the contractor and employer, the materialman or the owner who proposes to make a contract. The like rule of legality or illegality applies to the contractor or employer as to the purpose for which he may become and act as a member of the so-called 'boss-contractors' union.' The threat may be by word, gesture, sign or tone, and when you consider whether any particular line or course of conduct, or thing said or done, has menace or threat in it, you must consider all the circumstances under which the thing is said or done — what reasonably was the intent sought to be con-

¹ Parker et al. v. Bricklayers' Union (1889), 21 Cin. Wkly. Law Bul. 223. In this case the jury returned a gen-

eral verdict for \$3,700 as compensatory damages for the injury inflicted.

§ 550. Combination liable for damages occasioned.—Combinations which amount to conspiracies to oppress and injure others are liable for all damages occasioned by their unlawful, malicious, oppressive or injurious acts.¹

Any union, association or combination in the pursuance of its own lawful ends may do many things the incidental effect of which is to inflict loss upon others, and the loss incidentally inflicted by a union or an association or a combination in the legitimate pursuit of its own legitimate objects may even be greater and more ruinous than the loss directly effected by a conspiracy. The extent of the damage does not determine the character of the conspiracy. A very slight damage will give rise to a cause of action if such damage, however slight, is the result of a combination the express object of which is to inflict that damage.

§ 551. The rights of labor.—The many statutes specially favoring labor organizations, passed in many of the states, will be referred to hereinafter, and it will be found that in spirit most of these acts are diametrically opposed to the various more or less drastic laws passed against combinations of capital; in other words the several state legislatures, generally speaking, seem disposed to protect and encourage combinations of labor, and to forbid and discourage combinations of capital. But aside from statutory provisions, the rights of labor to combine are pretty well settled by judicial decisions.

Under the authorities.—From the cases and authorities already cited, it is clearly established that labor has the right to combine:

1. To raise the price of labor, *i. e.*, to maintain and to raise wages.

2. To limit the quantity of labor — *i. e.*, to regulate the num-

veyed by the person uttering the word or doing the thing. The intent reasonably conveyed must be to do some wrongful thing to the person or property, and in violation of the legal right of the one sought to be influenced. The intimidation meant is the effect of such things said or done, or threat made, as reasonably put one in fear, and control his freedom of action, or thus compel one to

act out the will of another instead of his own will."

¹ Longshore Printing Co. v. Howell, 26 Oreg. 527, 38 Pac. R. 547; Lucke v. Clothing Cutters' Assembly, 77 Md. 396, 26 Atl. R. 505; Moores v. Bricklayers' Union, 23 Cin. Wkly. Law Bul. 48; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. R. 345; Crump v. Com., 84 Va. 927, 10 Am. St. R. 895.

ber of apprentices and the conditions under which they shall be received.

3. To strike — provided the withdrawal from employment is voluntary on the part of all concerned, involves no breach of contract, is peaceful and orderly, and is for a lawful purpose.

4. To establish and dictate generally terms and conditions upon which the members will work — provided, always, there are no threats, no oppression, no coercion.

The labor world now and then complains of the decisions of the courts as being unfriendly to labor. The earlier decisions, as we have seen, were based upon earlier notions of combinations; but of all the labor cases passed in review, and of all that will be discussed under "Rights and Remedies," there is not one adverse to labor that does not disclose acts either unlawful, often criminal, or grossly oppressive. In no recent case has a court intervened to restrict the right of labor to combine to maintain or raise wages, to regulate so far as possible the supply of labor, to establish terms and conditions of employment, and so on; but when the combinations have gone farther and, in a mistaken attempt to further their cause, have done things positively unlawful, have coerced, threatened and assaulted others — usually fellow laboring men — and have deliberately planned to destroy the business of parties who did not happen to agree with them, the courts have been obliged to intervene, to prevent by injunction, if possible, threatened or continuing injuries, to punish unlawful acts, to award damages for injuries unjustly sustained. In most cases the courts have intervened reluctantly and too weakly, for the notion prevails that it is not conducive to popularity to issue injunctions against or in anywise interfere with labor unions. This notion is a mistake; for labor, as a body, is as law abiding and law respecting as capital, and the judge who weakly yields to political considerations is held in contempt by the entire community, and by no class more than that which he is truculently favoring.

PART V.

ILLEGAL COMBINATIONS OF CAPITAL.

- CH. 14. OPPRESSIVE COMBINATIONS GENERALLY.
- 15. SIMPLE COMBINATIONS.
- 16. TRUSTS.
- 17. CORPORATE COMBINATIONS.
- 18. RIGHTS OF CAPITAL.

CHAPTER 14.

OPPRESSIVE COMBINATIONS GENERALLY.

- §§ 552, 553. Some general propositions.
- 554. The test of the legality of a combination of capital.
- 555. Present drift of judicial opinion.
- 556. A combination is presumed legal.
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- 563-573. Boycotting by capital.
- 574. "Blacklisting."
- 575-577. "Blacklisting"—Rights and duties of employers as regards discharged employees.
- 578. "Clearance," or certificate of character.
- 579. Action for conspiracy to do a lawful act.

§ 552. Some general propositions.—The authorities already discussed under the head of Legal Combinations (see chapter VII) are to the effect that combinations of capital may be formed the objects of which are:

- (*a*) To control competition;
- (*b*) To control prices;
- (*c*) To control production.

As the cases cited more amply show, each of these objects has been attained in a variety of ways — by agreements, by as-

sociations, by combinations, by organization of large corporations to buy out and absorb smaller concerns; so that it will not do to say that a given combination is illegal because

- (a) It tends to control competition; or
- (b) It tends to control prices; or
- (c) It tends to control production.

And for reasons and authorities already given (see chapter 8) it will not do to say that a given combination is illegal because

- (d) It tends to create a monopoly;
- (e) It tends to restrain trade.

A combination may tend towards all these things and be both legal and beneficial; or a combination may have none of these tendencies and yet be illegal and pernicious.

The tendencies above enumerated are not the tests of illegality. (Always excepting, of course, statutory provisions, which may make them the tests directly or indirectly.)

§ 553. It is a dangerous doctrine to condemn a combination on account of its supposed tendencies. A tendency is more a matter of opinion than a matter of fact. Given certain facts, the question whether these facts tend toward a result is a question that will be answered differently by different minds. Whether any particular association or combination does stifle competition is a question of fact, to be determined from evidence and not from impressions. Whether or not a given combination possesses a monopoly of any particular trade, industry or occupation is a matter of fact to be ascertained from evidence. To say that a combination tends to create a monopoly, or tends to restrain trade, or tends to stifle competition, is equivalent to saying that the combination as a matter of fact does not do or accomplish any one of these objects, but at the very most and worst it contains the possibility of accomplishing the several ends, and therefore it is illegal; not because it is actually guilty of anything either unlawful or contrary to public policy, but because its situation is such as to render it possible for the combination to do that which is unlawful or contrary to public policy. It will hardly do to condemn a combination as unlawful upon such reasoning as this. There is the possibility that every law-abiding citizen may become a criminal; there is the possibility that every individual possessing

great wealth may use that wealth to the disadvantage of other parties or to the detriment of the public. The larger a partnership and the more powerful a corporation becomes, the greater the possibility of doing that which is injurious or oppressive; but individuals, partnerships and corporations are not condemned on account of any of their supposed tendencies. The law views actual conditions and results rather than possibilities, whether near or remote. There are few lines of decisions more pernicious than those which arbitrarily dispose of valuable property rights on account of alleged tendencies.

§ 554. The test of the legality of a combination of capital. The test of the legality of any particular combination of capital is whether or not the combination is a criminal or a civil conspiracy. If it is neither a criminal conspiracy nor a civil conspiracy, then it is legal, notwithstanding the fact that its power may be such that the temptation to exercise the power to the disadvantage of others is great,—so great in fact that reasonable men might say that the possession of such power tends to the development of the combination into a conspiracy. The test of the legality of a combination of capital is exactly the same as the test of the legality of a combination of labor. Neither the one nor the other can be condemned on account of any supposed tendencies. Before either combination could be pronounced illegal, the proof of its illegal character must be clear and conclusive; and the proof must be as clear and conclusive in the case of a combination of capital as in the case of a combination of labor. At the present time it would startle both the labor and the legal world to have the courts pronounce a combination of labor illegal because it tends to advance wages in the particular occupation, or because it tends to control the supply of labor in the particular industry, or because it tends to restrain some particular trade. The prime object of a combination of labor is to advance wages either directly or indirectly by shortening working hours. If labor may combine to advance wages, it goes without saying that capital should be permitted to combine to advance prices. In fact, an advance of prices may be absolutely necessary in order to successfully meet the demands of the combination of labor. Courts may readily test the validity of their decisions concerning combinations of capital by applying the language used to

combinations of labor; if the language is applicable to both cases the chances are that it is sound and of general validity. If, however, the propositions laid down concerning combinations of capital will not fit combinations of labor without depriving labor of its admitted rights, then they are not valid as regards capital.

Many of the cases about to be considered will be found to contain elements which make them either civil or criminal conspiracies. Such combinations are undoubtedly illegal; but there are also many decisions against combinations of capital wherein the facts recited do not disclose elements of either criminal or civil conspiracy. These decisions are given for what they are worth.

§ 555. Present drift of judicial opinion.—The present tendency of judicial opinion is adverse to combinations of capital, and, as will be seen from an examination of the cases, combinations are held illegal simply because they tend to control prices, competition or production, regardless whether the attempt is wise and prudent or not.

§ 556. A combination is presumed legal.—Every combination, whether a partnership, an association, a corporation, or a combination of these various factors, is presumed legal until the contrary is shown by affirmative evidence.

It has been said that the presumption of law is always against the validity of agreements in restraint of competition and in restraint of trade. "Where they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods to which the hope of gain makes human ingenuity so fruitful, to strangle competition outright and breed monopolies, the law, while it may not punish, will not enforce them."¹ But it is apparent from the former proposition that before this presumption of law is indulged in it should affirmatively appear that an actual monopoly has been created by the

¹ Hoffman et al. v. Brooks et al. Law Bul. 310; Coal Co. v. Same (1884), 11 Wkly. Law Bul. 258. See also Salt Co. v. Guthrie (1880), 35 Ohio St. 666; Crawford & Murray v. Wick (1868), 18 Ohio St. 190; McBirnie v. White Lead Co. (1883), 9 Wkly. Law Bul. 310; Coal Co. v. Same (1871), 68 Pa. St. 173; Arnot v. Coal Co. (1877), 68 N. Y. 558; Craft v. McConoughy (1875), 79 Ill. 346; Hilton v. Eckersley, 6 E. & B. 47; Stanton v. Allen (1848), 5 Denio, 434.

agreement. Certainly before an agreement is presumed invalid a court should be able to ascertain from its face that it is of illegal character. And, notwithstanding the authorities last cited, the proposition that an agreement is to be presumed invalid simply because it includes a certain percentage of any particular business or occupation in any particular territory is not sound.

In accordance with the views hereinbefore expressed, it is submitted that the correct doctrine is that all agreements underlying combinations are presumed valid unless they show upon their face that the object of the agreement is to do that which is unlawful, injurious or oppressive. However, the presumption of validity which attaches to an agreement apparently legal in its terms and upon its face may be overcome by proof that, as a matter of fact, the agreement was entered into and the combination formed for unlawful, injurious or oppressive objects.

§ 557. **Combination — Definition of the term “combine.”** Before proceeding further with the discussion of the general principles and the cases, it is interesting to know the meaning that the courts have attached to the term “combine.” In passing upon a combination of steamboat owners, where the agreement provided for a joining of the companies for the protection of certain mutual interests, the disposition of the case turned entirely upon the interpretation to be given to the word “combine” as employed in a New York statute. The court said:¹ “It is contended that the word ‘combine’ is only to be understood in its bad sense, *i. e.*, to prevent that which is contrary to public policy, or injurious to the public, and that what is sought to be prevented by the act is a consolidation of the companies, or a combination, confederation or conspiracy. The word ‘combine’ is not to be found in either of the dictionaries of Burrill or Bouvier, and I do not find it defined in the edition of Jacob to which I have access. Bouvier defines combination as a union of men for the purpose of violating the law, and as a union of different elements. Jacob, without specifically defining the word, states that ‘combinations to do unlawful acts are punishable before the unlawful act is executed; this is to prevent the consequences of combinations and

¹ *Watson v. Harlem & N. Y. Nav. Co.* (1877), 52 *How. Pr.* 348.

conspiracies;' and he refers to the titles 'Confederacy' and 'Conspiracy.' He defines confederacy to be 'where two or more combine together to do any damage or injury to another, or to do any unlawful act.' As to the meaning of the word 'conspiracy,' he says this word was formerly used almost exclusively 'for an agreement of two or more persons falsely to indict one, or to procure him to be indicted, of felony; now it is no less commonly used for the unlawful combination of workmen to raise their wages, or to refuse working except on stipulated conditions.' Worcester defines 'combine' thus: 'to join together;' 'to coalesce;' 'to unite;' 'to be united;' 'to be joined in friendship or in design.' And he defines 'combination' to be a 'union of persons for certain purposes;' 'association,' 'alliance,' 'coalition,' 'confederacy.' And Roget, in his *Thesaurus*, classifies the word 'combine' as synonymous with or belonging to the same class as 'unite, incorporate, amalgamate, imbody, absorb, re-imbody, blend, merge, fuse, melt into one, consolidate, coalesce, centralize, to impregnate, to put together, to lump together.' It is a familiar rule in the construction of statutes that the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and proper use, and that courts should not resort to subtle and forced construction for the purpose of either limiting or extending their operation.¹

"Keeping this principle in view, I think that there can be no difficulty in determining precisely what the legislature intended in using the word 'combine' in the twenty-second section of the act now under consideration. They did not intend to use, and did not use, that word in the strict technical legal sense which is maintained by the counsel for the defendants. The object of the legislature was to prevent coalitions, unions, mutual agreements, blendings of the companies which might be organized and incorporated, under the act, for any purpose. Whether this was a provision which was wise or unwise, it is not for me to determine. As I view it, the legislature did not intend to prevent the combination of these companies *solely* as respects the commission of unlawful acts, but also as respects

¹Dwarris on Statutes by Potter, well (1854), 11 N. Y. 601, 602, and p. 193; McClusky, Agent, v. Crom- cases cited.

the arrangement of freight and passenger rates, and the numerous other matters which are specified in the agreement. I have said that with the propriety of this provision it is not within the province of this court to deal; and yet it may be said, while on this point, that many considerations suggest themselves which go to show the propriety and necessity of such a provision. The plain object of the legislature was to prevent the creation or formation of monopolies by the union or combination of these companies. It can readily be seen that such a result might, and indeed almost necessarily would, result from such a combination.

“This very case presents an illustration of this point. Here are two companies which have been competing for the transportation of passengers and for public traffic; the rivalry and competition between them has been, according to the affidavits, most severe and keen. The tendency of this competition naturally would be for the benefit of the traveling public, in reducing the rates for fares and freights. Suddenly these competitors come together and make the agreement which is the subject of consideration, for their ‘*joint benefit*,’ not for the benefit of the public. Assuming, however, that the word ‘combine’ is to receive the limited construction which is contended for by the defendants’ counsel, and that it is to be taken in its bad sense, as intended to prevent something which is contrary to public policy or injurious to the public, it seems to me that the defendants must fail. If the legislature designed by the provision to prevent the formation or creation of monopolies, as I have endeavored to show, the creation or formation of such a monopoly is contrary to public policy and injurious to the public.”

§ 558. **Combination authorized by statute.**—Where a combination is specifically authorized by statute it is valid, providing the statute itself is constitutional.

Where two telegraph companies, engaged in ruinous competition, came to an agreement by which one office was to be leased, the expense divided and earnings shared in certain proportions, and the competition thereby stifled, the law of the state of New York sanctioned such consolidation.¹ In this particular instance the court said: “In the absence of any legisla-

¹ *Benedict v. W. U. Tel. Co.* (1881), 9 Abb. N. C. (N. Y.) 214, 221.

tion, it might be argued that such arrangements were against public policy as tending to prevent competition; but in view of the legislation which authorizes the consolidation of these corporations, the purchase and sale of their franchises, the joint construction and use of telegraph lines, all of which tend to prevent competition, it cannot be said that any such public policy is countenanced by the legislature of this state."

The legislature of the state of Illinois in 1897 expressly sanctioned the combination of gas companies, and provided that the rights of dissenting stockholders might be condemned "by the exercise of the power of eminent domain." This act was passed in the interest of certain gas companies, and its constitutionality—never having been passed upon by the supreme court of the state—may well be doubted.¹

¹In this connection it would be interesting to compare at some length *People v. Chicago Trust Co.*, 130 Ill. 268, and the case of *Rafferty et al. v. Buffalo City Gas Co.* (1899), 37 App. Div. 618, wherein a combination of gas companies was held legal; and *State ex rel. Snider v. Portland National Gas & Oil Co.* (1899), 53 N. E. R. 1089, wherein a combination of two gas companies was held illegal and the charter of one forfeited.

Certain sections of the Illinois act above referred to are as follows:

"Sec. 1. That all gas companies now organized, or hereafter to be organized, in this state, are hereby authorized and empowered to sell, transfer and convey, or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease and to hold and enjoy said property."

"*Consolidation.*—Section 2. It shall be lawful for any gas company now organized, or hereafter to be organized, in this state, doing business in the same city, town or village, to consolidate and merge into a single cor-

poration, which shall be one of said merging and consolidating corporations, by complying with the provisions of this act, as hereinafter specified."

"*Consolidation, how made.*—Section 4. The purchase and sale or lease, or the consolidation and merger, hereby authorized may be made in the manner following: The respective boards of directors or trustees of the company or companies proposing to sell and lease its or their property, and of the company proposing to purchase or lease the same, as under section 1, or of the companies proposing to consolidate and merge into a single corporation, as under section 2, may enter into and make an agreement or agreements, under their respective corporate seals, for such sale or purchase or lease, or for such consolidation and merger, describing the terms and conditions thereof and the mode of carrying the same into effect."

"*Dissenting stockholders to give notice.*—Section 7. If any stockholder of any of the companies, parties to the agreement or agreements provided for in section 4, not voting in favor of or not acquiescing in such agreement or agreements, objects to

§ 559. **Combinations of capital for (a) unlawful purposes, and for (b) oppressive purposes.**—For purposes of investigation combinations of labor were divided into two fairly well defined classes, namely, those combinations the purposes and objects of which are of an unlawful character, and those combinations the purposes and objects of which are of an oppressive character. It would be feasible to distribute combinations of capital into the same classes, for every proposition of a general character laid down concerning the validity of combinations of labor applies with equal force and effect to combinations of capital, and *vice versa*. But in order to follow the development of combinations of capital a somewhat different classification has been chosen, and will be outlined a little further on.¹

The right to employ his labor and capital as he pleases for any lawful purpose is an essential part of the personal liberty guaranteed each man by free institutions. A combination of two or more persons to interfere with this freedom, and by oppression, coercion or intimidation to restrict this right, is a conspiracy. It is a criminal conspiracy if any of the means used or objects in view are of a criminal character; if no criminal element enters into the means or the objects, then it is a civil conspiracy.²

the purchase or lease, or the consolidation and merger, as defined in said agreement or agreements, he shall give notice of his dissent within thirty days of such meeting and may demand payment for his stock, and shall thereupon receive from said corporation in which he shall hold stock its fair cash value, at the time when the vote for the agreement or agreements was so cast, and such corporation shall cancel the same. But if such dissenting stockholder shall refuse to part with his stock, or if the value of the same cannot be agreed upon, then such corporation shall, within ninety days of the time of said meeting, proceed to take and acquire the same and the interest of said dissenting stockholder therein, by the exercise of the power and right of eminent domain, hereby

granted to such corporation for that purpose, and paying to, or tendering to, such dissenting stockholder, or to the county treasurer for his use, the value of the stock by him held, such value to be ascertained as of the time aforesaid and to be found and determined in the manner provided for the condemnation of property for public use in the act entitled 'An act to provide for the exercise of the right of eminent domain.' Any stock so acquired shall be canceled by the company acquiring the same. If such stockholder shall not give notice of his dissent within thirty days, as aforesaid, he shall be held to have acquiesced in the agreement aforesaid and shall be subject thereto." Ill. Stat. (1897), ch. 32.

¹ See §§ 580–583.

² Jackson et al. v. Stanfield et al.

§ 560. Extent of injury inflicted upon others by a combination not a test of legality.— But the extent of the injury inflicted upon third parties is not a test of the legality of any particular combination. The formation and operation of a combination may ruin competitors and the combination still be entirely legal; or the formation and operation of a combination may only slightly injure third parties and the combination may be illegal. As has already been noted, the success of one man frequently means the direct or indirect loss of another. Competition is merciless in this respect. The volume of a particular trade being limited, it is impossible for all embarking therein to attain the same measure of success; some achieve wealth and importance, others are lost in the struggle. Every large firm, every large establishment, every department store, every association, and every combination in any particular trade or industry, means, as a rule, greater advantages to those who are thereby successful, and corresponding disadvantages to those who are not so successful in making use of the opportunities offered by co-operation.

The law affords no remedy for the damage which inevitably results to the small trader, dealer or manufacturer from the legitimate operations of the large. The law permits the formation of associations and combinations the very object of which is to acquire, if possible, control of a particular trade or industry. If the test of the legality of an association or a combination were the extent of the damage, loss or injury inflicted upon others engaged in the trade, then many a firm and many an association that has achieved high standing through years of industry and sagacious effort would be condemned as illegal solely on account of its success. The test of the legality of the combination lies in its objects and the means used to attain the objects. If the injury inflicted upon others is

(1894), 187 Ind. 592, 36 N. E. R. 345; (1891), 88 Mich. 15, 49 N. W. R. 901; *People v. Petheran* (1887), 64 Mich. 252, 31 N. W. R. 188; *State v. Stewart* (1887), 59 Vt. 273, 9 Atl. R. 559; *Walker v. Cronin* (1871), 107 Mass. 555; *Carew v. Rutherford* (1870), 106 Mass. 14; *Com. v. Hunt* (1842), 4 Met. 111; *More v. Bennett* (1892), 140 Ill. 69, 29 N. E. R. 888; *Lovejoy v. Michels* (1891), 88 Mich. 15, 49 N. W. R. 901; *Greenh. Pub. Pol.* 651; *Delz v. Winfree* (1891), 80 Tex. 400, 16 S. W. R. 111; *Murray v. McGarigle* (1887), 69 Wis. 483, 34 N. W. R. 522; *Buffalo Lub. Oil Co. v. Standard Oil Co.* (1887), 106 N. Y. 669, 12 N. E. R. 825; *Texas Standard Oil Co. v. Adoue* (1892), 83 Tex. 650, 19 S. W. R. 274.

simply incidental to the legitimate prosecution of the lawful business of the combination, then the party injured is without remedy. If, however, the injury inflicted, no matter how slight, is the very purpose and object of the combination, then the latter is a conspiracy.

The right of a combination of dealers to advance their own interests by mutually agreeing that they would not deal with any manufacturer or wholesale dealer who should sell directly to customers has been broadly upheld,¹ the court saying: "The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions in all departments of labor and business for purposes of mutual benefit and protection. Confined to proper limits both as to end and means, they are not only lawful but laudable. Carried beyond these limits they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go without interfering with the legal rights of others is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is perhaps danger that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they may be led to transcend the limits of their jurisdiction, and like the court of King's Bench in *Bagg's Case*, 11 Coke, 98*a*, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or as Lord Ellsmere puts it, 'to manage the state.' But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong and even exaggerated assertion, and in many words and expressions of very indefinite and illusive meaning, such as 'wreck,' 'coerce,' 'extort,' 'conspiracy,' 'monopoly,' 'drive out of business,' and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns and villages are

¹ *Bohn Mfg. Co. v. Hollis et al.* (1893), 54 Minn. 223, 55 N. W. R. 1119.

not only a public convenience but a public necessity; also, that to enable the owners to maintain these yards they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade. Now when reduced to its ultimate analysis, all that the retail lumber dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers directly to consumers or non-dealers at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion or intimidation either towards plaintiff or the members of the association."¹

¹ The court is in error, however, where it goes on to say:

"What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some

loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the rea-

§ 561. Combination of employers to resist demands of employees.—A combination of employers to resist an artificial advance in wages demanded by a combination of employees is lawful, inasmuch as the combination of employers is not made for the purpose of interfering with the rate of wages as normally regulated by supply and demand.¹

And it is not unlawful coercion for such combination of employers to notify dealers in the supplies used by them not to sell supplies to an employer who is not a member of the combination, and who had yielded to the demands of the employees. It is not unlawful coercion to inform such dealers in supplies that no member of the combination of employers would buy from dealers if they sold to such outside employer who had yielded to the demands of the employees.²

son that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. *Bowen v. Matheson* (1867), 14 Allen, 499; *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598 (1892), App. Cas. 25; *Parker v. Huntington* (1854), 2 Gray, 124; *Wellington v. Small* (1849), 3 Cush. 145; *Payne v. Western & Atlantic R. Co.* (1884), 13 Lea, 507.

“With these propositions in mind, which bring the case down to a very small compass, we come to another proposition, which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultane-

ous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see anything unlawful or actionable in it.” Citing *Commonwealth v. Hunt* (1842), 4 Met. 111; *Carew v. Rutherford* (1870), 106 Mass. 1; *Mogul Steamship Co. v. McGregor* (1892), App. Cas. 25.

¹*Cote v. Murphy et al.* (1894), 159 Pa. St. 420, 28 Atl. R. 190.

²*Cote v. Murphy et al.* (1894), 159 Pa. St. 420, 28 Atl. R. 190; *Buchanan v. Kerr et al.* (1894), 159 Pa. St. 433, 28 Atl. R. 195. In *Cote v. Murphy et al.*, the facts as recited by the court in its opinion were as follows: “The defendants were members of the Planing Mill Association of Allegheny county, and Builders’ Exchange of Pittsburgh. The different partnerships and individuals composing these associations were in the business of contracting and building, and furnishing building material of all kinds. On the first of May,

The right of employees to demand that eight hours should constitute a day's work is clear. It is the right of a laborer to fix such value on his services as he sees proper; there is no power lodged anywhere to compel him to work for less than he chooses to accept. And it is also clear that workmen may agree together that they will not work for less than a fixed scale, and that by all lawful means, such as reasoning and per-

1891, there was a strike of the carpenters, masons and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building. The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant. Then a strike by the unions of the different trades was declared. The plaintiff, at the time, was doing business in the city of Pittsburgh, as a dealer in building materials. He was not a member of either the Planing Mill Association or of the Builders' Exchange; there were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen; they sought to secure building material from dealers, wherever they could, and thus go on with their contracts; if they succeeded in purchasing the necessary material, the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay; the tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow-workmen who were idle. The two associations already named sought to enlist all concerned, as contractors and builders, or as dealers in supplies, whether members of the association or not, in the furtherance of the one object — resistance to the demands of the workmen. The plaintiff, and six other individu-

als or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance by inducing lumber dealers and others to refrain from shipping or selling them, in quantities, the lumber and other material necessary to carry on the retail business; in several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other or both of the associations engaged in the contest with the striking workmen. The strike continued about two months. After it was at an end the plaintiff brought suit against defendants, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried out by a refusal to sell to him building materials, themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court upon the evidence, there was a verdict for plaintiff in the sum of \$2,500 damages, which the court reduced to \$1,500; then judgment; and from that defendants take this appeal."

suasion, they will prevent other workmen from working for less.¹

But what is permitted to employees is also permitted to employers, and it cannot be successfully urged that employees

¹ Referring to the law of Pennsylvania the court said: "At common law this last was a conspiracy and indictable, but under the acts of 1869, 1872, 1876 and 1891, employees acting together by agreement may, with few exceptions, lawfully do all those things which the common law declared a conspiracy. They are still forbidden, in the prosecution of a strike, preventing any one of their number who may desire to labor from doing so, by force or menace of harm to person or property." And referring to the particular strike involved the court said: "But the strike here was conducted throughout in a lawful, orderly manner. The employers—contractors and others engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged—refused to concede the demands of the workmen, and there followed a prolonged and bitter contest. The members of the associations refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight-hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further. They agreed among themselves that no member of the association would furnish supplies to those who were in favor of, or had conceded, the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers. To the extent of their power this agreement was carried out. This,

clearly, was combination, and the acts of assembly referred to do not, in terms, embrace employers. They only include, within their express terms, workmen. Hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators in their attempts to resist the demands for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance. That which, by statute, is permitted to the one side, the common law still denies to the other. If this position be well taken, we then have this inequality: The plaintiff who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages sues, for damages, members of another combination who resist the advance. Nor is there any difference in the character of the acts or means on both sides in furtherance of their purposes. The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work until the demand is conceded. The employers will not sell to contractors who concede the demand and they do their best to persuade others engaged in the same business from doing so. Then the element of real damage to plaintiff is absent. By far the larger number of dealers in city and county were members of the combination which refused to sell. Only the plaintiff and six others refused to enter the combination. The result was that these seven had almost a monopoly of furnishing supplies to all builders

may be permitted to combine together to advance their wages while employers shall not be permitted to combine together to resist by lawful means the advance demanded.¹

§ 562. If the legislature sees fit to relieve a portion of the citizens of the commonwealth, namely, laborers, from the common-law prohibitions against combinations to raise the price of labor, then the operation of the law of supply and demand is set aside and a combination of employers for the purpose of resisting the demand for increased wages is not a conspiracy interfering with the normal operation of the law of supply and demand in the market, but is simply a combination to meet a situation artificially created. "The combination of the employers, then, was not to interfere with the price of labor, as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice towards plaintiff or others, is lacking, and this is the essential element on which is founded all the decisions as to common-law conspiracy in this class of cases; and, however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress a market price, when they combine to resist a combination to artificially advance price."²

who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased. In a few instances he paid more to wholesale dealers and put in more time buying than he would have done if the associations had not interfered with those who sold him. But it is not denied that as a result of the combination he was, individually, a large gainer. True, he avers that if defendants had gone no further than to refuse to sell, themselves, he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him. But

that, by the fact of the combinations and strike, he was richer at the end than when they commenced, is not questioned."

¹ *Cote v. Murphy et al.*, *supra*. See also *Com. v. Carlisle* (1821), *Brightly*, N. P. 36.

² From the opinion of the court in *Cote v. Murphy et al.*, *supra*. In this connection the court also said: "The fixed theory of courts and legislators then was that the price of everything ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor; and this was soon followed by the legislation

§ 563. Boycotting by capital.— Boycotts are by no means confined to labor. Any conspiracy the object of which is to maliciously injure another by diverting trade by means of threats against parties who continue to do business with the party objected to is a boycott.

already noticed, relieving workmen from the penalties of what for more than a century had been declared unlawful combinations or conspiracies. Wages, it was argued, should be fixed by the fair proportion labor had contributed to production; the market price, determined by supply and demand, might or might not be fair wages, often was not, and as long as workmen were not free, by combination, to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however, is clear: the moment the legislature relieves one, and by far the larger number of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which the common-law conspiracy was based, as to that particular subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combinations interfered with the price, which would otherwise be regulated by supply and demand. This interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price. Workmen, by reason of the combination, were not willing to work for what, otherwise, they would accept. Employers would not pay what otherwise they would

consider fair wages. Supply and demand consist in the amount of labor for sale, and the needs of the employer who buys. If more men offered to sell labor than are needed, the price goes down, and the employer buys cheap. If fewer than required offer, the price goes up, and he buys dear. As every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy, in this class of cases. But in this case the workmen, without regard to the supply of labor, or the demand for it, agreed upon what, in their judgment, is a fair price, and then combined in a demand for payment of that price. When refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded. Further, they agree, by lawful means, to prevent all others, not members of the combination, from going to work until the employers agree to pay the price fixed by the combination. And this, as long as no force was used, or menaces to person or property, they had a lawful right to do; and so far as is known to us, the rise demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand. It was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the

Where a hotel-keeper in a small town incurred the ill-will of certain leading merchants, and they to get even with him spread the report that they would not buy of any traveling salesman who stopped at that hotel, it was held that the action of the merchants amounted to a boycott, and that they were liable for damages sustained by the hotel-keeper, although there was no direct proof of any confederacy or agreement among the merchants; the evidence simply tended to show a concert of action among the parties who had similar grounds of complaint against the hotel-keeper.¹

demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination were concerned, was, by combination, wholly withdrawn, and, as to workmen other than members, to the extent of their power, they kept them out of the market. By artificial means the market supply was wholly cut off."

¹ Webb v. Drake et al. (1899), 52 La. Ann. —, 26 S. R. 791. Referring to the evidence, the court said: "Upon the basis of this evidence and of the surrounding circumstances, we are forced to the conclusion that Miller, Drake and Thomas Crichton were intensely exasperated against the plaintiff, and determined to retaliate in kind for what they conceived to be injuries received at his hands, consisting, as it appears, of what they considered overassessments of property in which they were interested, and proceedings against them for failing to make returns. The evidence shows that they were among the most influential business men in Minden. As merchants, the two Crichtons (each having a separate store) and Drayton are said to do more business than all the other merchants in the town combined, and they buy largely through drummers. In addition to this, they are the presidents and stockholders of and

in various business corporations. Miller also is a man of position and influence, being cashier of and stockholder in the only bank in the place. We think that the evidence justifies the conclusion that they determined, as a measure of retaliation, to use their influence to destroy the business of Webb's hotel by withdrawing from it the drummer patronage upon which it relied. Whether they entered into a formal or an informal, a written or an unwritten, agreement or contract to that effect, is wholly immaterial. That the matter was discussed between them is beyond all question, and each acted with knowledge that the other was acting upon the same lines and for the accomplishment of the same purpose. The fact that they were inimical to the plaintiff, and would not favor, in a business way, those who patronized his hotel, was made so widely known that drummers approaching the town were informed of it before reaching there; and the information appears to have reached them in such a way as to suggest that the boycott was participated in, not only by those who originated it, but by all the merchants in the place. Smith, one of the drummers, testifying for himself, says, in substance, that in visiting Minden he was not looking to the hotel for patronage, but to the merchants, and that, as the hotel-keeper antagonized

This is undoubtedly an extreme case and of very doubtful law. Any man may arbitrarily refuse to deal with a salesman who stops at a particular hotel; or, to state the proposition more generally, any man may, either capriciously or arbitrarily or for cause, decline to have business relations with any other man. Furthermore, if a man feels aggrieved against another, he may go about airing his grievances, providing, of course, that he keeps within lawful bounds, and does not publish that which is slanderous or libelous. He may urge his friends and business acquaintances to refrain from dealing with the party against whom he feels aggrieved. If several feel the same animosity towards another they may meet and discuss their real or supposed grievances, and it is difficult to say why they may not agree among themselves that they will not buy goods of any man associated with the party they dislike. Certainly they might agree that they would not buy goods of the party himself, or of any of his salesmen, or of any of his business associates.

Certainly the evidence of a conspiracy to oppress should be clear before the parties are held in damages for participating in such a conspiracy. It is not sufficient to show that they have a common cause of grievance, and that individually and separately they have refused to patronize parties having business relations with the objectionable party. If, however, the evidence is clear that the parties complained of combined together for the purpose of inflicting loss and damage upon another, then such a combination is a conspiracy.

An essential element of the boycott is the use of the power of the combination to coerce and intimidate third parties into refusing business intercourse with the party that is obnoxious to the combination. A common grievance in cities is the establishment of a livery-stable, or some other obnoxious trade or

his friends and patrons, he withdrew from persons patronizing a particular hotel, they may have felt some his patronage from the hotel. And curiosity, as Chapman expressed it, through Smith, it may safely be said, to know why it was; but beyond we hear the testimony of every drummer on the road. Their business in Minden was to sell goods, and that the affair did not concern them, when those to whom only they could nor were they likely to take any make sales gave it to be understood, chances. They simply ceased to patronize the objectionable hotel and and made it a matter of public notoriety, that they would not buy preserved their trade."

industry, in a desirable neighborhood; and it not infrequently happens that the owner of a piece of realty who wishes to sell the same, and who is unscrupulous in his methods, threatens and actually does establish a livery-stable or some obnoxious factory for the very purpose of compelling the neighborhood to buy him out. The outraged and exasperated people living in the vicinity may meet together and express their feelings, and may individually and jointly resolve to have no business relations whatsoever with the obnoxious party. Such a meeting, and the adoption of such resolution, would be neither a boycott nor a conspiracy, notwithstanding the fact that the desire was to inflict damages upon the party in question, and actual damages resulted. It is otherwise if the combination should seek to exercise its power as a combination by coercing third parties, who had no grievance against the party in question, or who, if they had a grievance, did not care to press it, into withdrawing their trade and patronage by threats that if they did not do so the combination would turn its power against them and subject them to damage. It would not be difficult to cite illustration after illustration running from one extreme to the other, and it is needless to say that many illustrations might be formulated wherein it would be exceedingly difficult to distinguish the element of conspiracy; but this difficulty is not peculiar to this branch of the law,—it is found in the discussion of all rights and wrongs, and all crimes and offenses. As a rule, however, each man knows very well when he oversteps the line and does that which he has no right to do, and juries have little trouble in solving these nice questions when all the facts are laid before them, and the general principles governing the law of the case are correctly stated by the court.

§ 564. The right of every man to refuse to work for, deal with or associate with any man or class of men according as he sees fit is of so fundamental a character that the courts are loath to interfere with or restrict this right; and accordingly where a large number of retail dealers form a voluntary association and agree not to deal with any manufacturer or wholesale dealer who should sell directly to consumers at any place where a member of the association was carrying on a retail business, the combination and agreement were held legal notwithstanding the fact that the by-laws of the association

provided that if any wholesale dealer or manufacturer made a sale direct to consumers, contrary to the rules of the association, he should be subject to fine, and failing to pay the fine the secretary should notify all the members of the association, with the object of affecting the trade of the recalcitrant manufacturer.

The retail dealer being not only a convenience, but in the nature of a public necessity, and the selling by wholesale dealers directly to consumers being demoralizing to the trade of the retailer, it is entirely legitimate for retailers to form associations to protect themselves from sales by wholesale dealers or manufacturers direct to consumers, where the means used to effect the objects of the association are lawful; and it is lawful for the members of such association to agree that they will not deal with any wholesale dealer or manufacturer who sells directly to consumer; and it is also lawful to provide for notice being given to all members of the association whenever the wholesale dealer or manufacturer makes such sale; in this there is no element of fraud, coercion or intimidation, either towards the wholesale dealers and manufacturers or towards the members of the association. The fact that according to the by-laws of an association a ten per cent. fine may be demanded from the wholesaler or manufacturer violating the rule involves no element of coercion or intimidation, it being entirely optional with the wholesaler or manufacturer whether he will pay the fine or not, and his decision will depend upon whether he values the trade of the members of the association higher than the trade of customers or dealers who are not members of the association.¹

§ 565. The court in the case last cited laid down the following general propositions:

1. “‘Injury,’ in its legal sense, means damage resulting from an unlawful act. Associations may be entered into the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious.”²

2. “If an act be lawful,—one that the party has a legal right

¹Bohn Mfg. Co. v. Hollis (1898), 54 Minn. 223, 55 N. W. R. 1119. 111; Steamship Co. v. McGregor, 21 Q. B. Div. 544.

²Citing Com. v. Hunt (1842), 4 Met.

to do,—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, ‘the exercise by one man of a legal right cannot be a legal wrong to another,’ or, as expressed in another case, ‘malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful.’”¹

3. “No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes call such contracts ‘unlawful’ or ‘illegal,’ but in every instance it will be found that these terms were used in the sense, merely, of ‘void’ or ‘unenforceable’ as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public.”²

4. “What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act.”³

§ 566. It is not unlawful for an association of master plumbers to send notices to wholesale dealers in plumbers’ supplies not to sell to plumbers who are not members of the association under penalty of withdrawal of the patronage of the latter.⁴

The authority of this decision in all its breadth and scope may well be questioned. The right of parties engaged in any

¹ Citing *Heywood v. Tilson* (1883), 75 Me. 225; *Phelps v. Nowlen* (1878), 72 N. Y. 39; *Jenkins v. Fowler* (1855), 24 Pa. St. 308.

² Citing *Steamship Co. v. McGregor*, 23 Q. B. Div. 598 (1892), App. Cas. 25.

³ The supreme court of Indiana came to somewhat different conclusions in *Jackson et al. v. Stanfield et al.* (1893), 137 Ind. 592, 36 N. E. R. 345, 37 N. E. R. 14, wherein members of a retail lumber dealers’ association, the

object of which was to restrict the liberty of wholesalers to sell to consumers and brokers, were held liable for damages occasioned to the broker by the enforcing and threatening to enforce the rules of the association, whereby a lumber company refused to sell to the broker, and the broker lost valuable contracts.

⁴ *Macauley Bros. v. Tierney et al.* (1895), 19 R. L. 255, 33 Atl. R. 1.

particular trade or occupation to combine together for their own advancement is beyond question. And in pursuance of this right they may lawfully agree that they will trade with certain parties or classes, and they may do all that they legitimately can to secure control of the trade or occupation they are interested in; but it is quite another matter to direct the strength and force of the combination against some third party that happens, for any reason, to be obnoxious to the combination. If a combination by good work, low prices and legitimate efforts can secure the entire control of a particular trade or occupation, and thereby incidentally deprive parties who are not members of the combination of all their business, such a course is not unlawful, and no right of action arises for the damages sustained by parties who may be entirely ruined. If, however, a combination, for the express purpose of ruining a third party, deliberately pursue a course the object of which is to intimidate others from dealing with such third party, then such course is unlawful, and the damages occasioned thereby may be recovered.¹

¹ In the case last cited the court reasoned as follows: "The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the association in case of a failure to comply, was unlawful, because it was intended injuriously to affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which ren-

ders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his

§ 567. It is not legitimate for parties to combine together and agree that they will withdraw their patronage from any particular dealer or class of dealers, with the object of coercing that dealer or class of dealers to injure some other party or parties.¹

§ 568. But it has been held that a railway company may post notices to employees to the effect that it will discharge them if they trade with a certain merchant, and that no action lies unless the notice in itself is libelous, even though the notice

business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted, and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival, or his servants or workmen, and the procurement of violation of contractual relations, are instances." In support of this reasoning the court relies largely upon the *Mogul Steamship Co.* case; but the facts in that case were very different from the facts presented to the supreme court of Rhode Island.

¹ In *Macauley Bros. v. Tierney et al.*, *supra*, the supreme court of Rhode Island, on this point, said: "The case at bar contained no element of the character of those enumerated by the lord justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the

members of the associations of their own rights, and not the exercise of a force violative of the rights of others as in the cases cited by the lord justice. It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the associations more than that of the non-members, they would doubtless comply; otherwise they would not." And in support of this proposition the Rhode Island court relied upon *Bohn Mfg. Co. v. Hollis* (1893), 54 Minn. 223, 55 N. W. R. 1119, hereinbefore commented upon. The reasoning of the court in the case just cited is by no means satisfactory. Attempted boycott by representatives of certain insurance companies held illegal. *Continental Ins. Co. v. Board of F. Underwriters et al.* (1895), 67 Fed. R. 310. An injunction will issue to restrain one manufacturer from issuing circulars threatening to bring suit for infringement against customers of a competing manufacturer, where it appears that the charges of infringement are not made in good faith, but with malicious intent to injure the competitor's business. *Emack v. Kane et al.* (1888), 34 Fed. R. 46.

be posted maliciously.¹ No question of combination or conspiracy was involved in this case, but the court in discussing the principles of law underlying the controversy considered the question whether or not it is unlawful for one person or a number of persons in conspiracy to threaten to discharge employees if they trade with a certain merchant.²

¹Payne v. Railroad Co. (1884), 81 Tenn. 507.

²In this connection the court said: "If the employees are engaged for fixed terms, it may be assumed that a discharge by the employer for such a reason would be unwarranted, and would give the employee an action for breach of contract. But no one else, except a privy, could complain of the breach of contract, and the ground of the employee's action would be the refusal of the employer to pay him for the period promised in the contract of service. If the service is terminable at the option of either party, it is plain no action would lie even to the employee; for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law. Much less could a stranger complain. No action could accrue either to employee or stranger for breach of contract, for no contract is broken. If the act is unlawful, it must be on other grounds than breach of contract; as, that it unjustly deprives plaintiff of customers and trade to which his fair dealing entitles him, and thus destroys his business. For any one to do this without cause is censurable and unjust. But is it legally wrong? Is it unlawful? May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And if one of them, then why not all four? And

if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number. And, if it were, who should say how many it would be lawful and how many unlawful to forbid? Nor can it be better determined by effect than by number. To keep away one customer might not perceptibly affect the merchant's trade; deprived of a hundred of them he might fail in business. On the contrary, my own dealings may be so important that if I cease to trade with him he must close his doors. Shall my act in keeping away a hundred of my employees be unlawful because it breaks up the merchant's business, and yet it be lawful for me to accomplish the same result by withholding my own custom? Obviously the law can adopt and maintain no such standards for judging human conduct; and men must be left without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause, without thereby being guilty of an unlawful act *per se*. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause, as the employer. He may refuse to work for a man or company that trades with any obnoxious person, or does other things which he dislikes. He may persuade his fellows, and the employer may lose all his hands and be compelled to close his doors; or he may yield to the demand and withdraw his custom or cease his dealings, and the

And while holding broadly that an individual might discharge one or all of his employees for trading with any objectionable person, the court also went on to hold that the same act if done by a combination would not render the combination illegal or subject to action, because the act itself was not an unlawful act. The court stated the question as follows: "Is an act not unlawful rendered actionable to the one suffering injury therefrom because it is committed wilfully, wickedly and maliciously, and in pursuance of a conspiracy to do the injury suffered? Does one render himself liable in damages for maliciously and wickedly exercising his rights or denouncing his intention of so doing, if thereby he injures another?"¹

obnoxious person be thus injured or wrecked in business. Can it be pretended that for this either of the injured parties has a right of action against the employees? Great loss may result, indeed has often resulted, from such conduct; but loss alone gives no right of action. Great corporations, strong associations and wealthy individuals may thus do great mischief and wrong; may make and break merchants at will; may crush out competition and foster monopolies, and thus greatly injure individuals and the public. But power is inherent in size and strength and wealth, and the law cannot set bound to it, unless it is exercised illegally. Then it is restrained because of its illegality, not because of its quantity or quality. The great and rich and powerful are guaranteed the same liberty and privilege as the poor and weak. All may buy and sell when they choose; they may refuse to employ or dismiss whom they choose, without being thereby guilty of a legal wrong, though it may seriously injure and even ruin others. Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employees at will, be they many or few, for good cause, for no

cause, or even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori* they may 'threaten' to discharge them without thereby doing an illegal act *per se*. The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employees. The law cannot compel them to employ workmen, nor to keep them employed. If they break contracts with workmen they are answerable only to them: if, in the act of discharging them, they break no contract, then no one can sue for loss suffered thereby. Trade is free; so is employment. The law leaves employer and employee to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employee may terminate the relation at will, and the law will not interfere, except for contract broken. This secures to all civil and industrial liberty. A contrary rule would lead to a judicial tyranny as arbitrary, irresponsible and intolerable as that exercised by Scroggs and Jeffreys."

¹ The court said: "To answer this

In holding that such acts if done by combination do not render the combination unlawful, the court loses sight entirely of the well-settled rule that a combination to intimidate, coerce, oppress or injure is illegal, and damages occasioned thereby may be recovered, although each act done by the combination in and of itself might be lawfully done by an individual. The majority of the court reached the following conclusion: "That the act done, *i. e.*, the publication of the notice that the company would discharge employees who traded with plaintiff, was not an unlawful threat nor an unlawful act; was not a libel; and though done wickedly and maliciously, and in pursuance of a wicked design, is still not actionable, because it was not an unlawful act, nor an act done in an unlawful manner." But a dissenting opinion was delivered by one judge and concurred in by another, in which the following proposition from Addison on Torts was quoted with approval: "Injuries to property indirectly brought about by menaces, false representation or fraud create as valid a cause of action as any direct injury from force or trespass. Thus, if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done." Also this proposition from the note by the American editor of the same work: "that preventing a person from trading with another, by posting placards near his place of business calculated to

correctly it must first be understood what is meant by 'malicious act.' In common parlance it is an act proceeding from hatred or ill-will, or dictated by malice, or done with wicked or mischievous intentions or motives. But surely this cannot be the sense in which the phrase is employed by Addison; for if it were, then my neighbor would be liable to me, if from ill-will or wicked motive he refused to let me get water at his spring; or to make a road for myself across his farm, or locked his pump or his gate against me, or built a fence on his own land across my path; or built his store or shop or a high fence on his own land in such close proximity to my windows as to exclude light and view; or digged on

his lot below the foundation of my house so as to endanger it. It is unreasonable that actions should be maintained for any of these things. For though my neighbor is causing me hurt, and that too from wicked motives, and is thus violating the moral law, he is only exercising his undoubted right to use his own for himself and deny me all privilege in it; and this the law does not punish, as has often been ruled in courts of the highest character. *Story v. Odin* (1815), 12 Mass. 157; *Mahan v. Brown* (1835), 13 Wend. 261; *Auburn & Cato R. R. Co. v. Douglass* (1854), 5 Seld. 444; *Lasala v. Holbrook* (1833), 4 Paige, 169; *Thurston v. Hancock* (1815), 12 Mass. 220."

bring him into contempt and injure his business, or issuing circulars and posting them near a person's workshop, the legitimate and natural effect of which is to cause his workmen to leave his employ, are actionable by the party injured."¹

¹ Applying these principles the dissenting opinion proceeded: "So here is an act threatened and done which of itself might be lawful, that is, to discharge the employee; but when you add a conspiracy to do so in all cases, if the parties trade with another and thus injure him, and to do this with that purpose, here is an act done directly with the evil intent that injures another, and much more should the party respond in damages for it. Whenever there is an act done with the purpose to injure another, and not simply in the exercise of one's legal right, and that injury is produced, and the means used naturally tend to the end designed, then for that injury the party should be held responsible, even though the act, with no such purpose and no such result, might be lawful." After referring to certain text-books and cases, the dissenting opinion proceeded: "Now, in all these cases the law gives a remedy where an injury is done to another, simply because a party, though exercising a legal right, and using his own, has neglected proper precautions to prevent an injury to his neighbor; much more should it give a remedy where the injury was purposed, and the use or exercise of his own right is only a cover to injure his neighbor. The exercise of no legal right *per se* will in the slightest degree be infringed. The party would only be required to exercise his legal rights for proper and justifiable purposes, and wherever these were shown there would be no liability; but whenever the exercise of the right was solely for the purpose of injury to another, and such injury followed, he should respond

in damages for that which he had purposely inflicted. He cannot complain at the purposed result of his own act being visited upon him. If, however, he could show it was exercised for justifiable cause, as in this case, because the party supplied liquor to intoxication or impure food, or the like, to his employees, by which their efficiency was lessened and he injured, then such an order would be justified."

Continuing, the dissenting opinion said: "The rule I have maintained is in strict accord with a maxim of the law, so well founded in reason as to need no argument or authority to support it; that is, that a man must so use his own as not to do injury to others. That this means he shall so enjoy his legal rights as not to do a wrong to the legal rights of another, I freely concede. But here is a use of his legal right to discharge employees, for the direct purpose and with no other, and for no other reason except to prevent their trading with a party legitimately entitled by his location and the character of his business to such trade. Here is the use of a legal right to deprive the other of that which is his legal right, to wit, the property he has in the good will of his business, which consists in his business character for integrity and fair dealing, his convenience of location to his customers, the character of goods he sells, and fairness of price for which they are sold, and the like. All these make up as elements of that property now well recognized in the law as the 'good will' of a business. For a party who has the power to use that power to destroy or injure the value of this

§ 569. It has also been held that an employer may refuse to employ or retain any employee renting certain premises, and the owner of the premises has no cause of action against

property in the exercise of a right, not for any reason of advantage to himself, but solely to injure another, ought not to be permitted by an enlightened system of jurisprudence in this country. It is argued that a man ought to have the right to say where his employees shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and like cases under the rule, we have maintained the party may always show by way of defense that he had reason for what he has done; that the trader was unworthy of patronage; that he debauched the employee, or sold, for instance, unsound food, or any other cause, that affected his employee's usefulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employee for good cause, or without any reason assigned, if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold the threat over the employee *in terrorem* to fetter the freedom of the employee, and for the purpose of injuring an obnoxious party. Such conduct is not justifiable in morals, and ought not to be in the law, and when the injury is done as averred in this case the party should respond in damages. The principle will not interfere with any proper use of the legal rights of the employer,—an improper and injurious use is all it forbids. In view of the immense development and large aggregations of capital in this favored country—a capital to be developed and aggregated within the life of the present generation more

than a hundred fold—giving the command of immense numbers of employees, by such means as we have before us in this case, it is the demand of a sound public policy, for the future more especially, as well as now, that the use of this power should be restrained within legitimate boundaries. Take for instance the larger manufacturing establishments of the country—of which we will in time have our full share, when thousands upon thousands of hard-working operatives will be employed. It will be to their interest to have free competition in the purchase of supplies for their wants, and its beneficial influences in keeping prices at the normal standard. The merchant and groceryman and other traders should be untrammelled to furnish these, and the employee untrammelled in the exercise of his right to purchase where his interest will best be subserved. If, however, these masters of aggregated capital can use their power over their employees as in this case, all other traders except such as they choose to permit will be driven away or crushed out, and their capital probably alone have a monopoly to furnish his employees at his own rates freed from competition. The result is that capital may crush legitimate trade, and thus cripple the general property of the country, and the employee be subject to its grinding exactions at will. The principle of the majority opinion will justify employers, at any rate allow them, to require employees to trade where they may demand, to vote as they may require, or do anything not strictly criminal that employer may dictate, or feel the wrath of employer by dismissal from service.

the employer, even though the employer was actuated by malice toward the owner.¹

There was no question of conspiracy or combination in the case last cited; the tenancy was a tenancy at will, and the employer ordered his employee to leave unless the rent was reduced. The court held that the employer had a vital interest in the welfare of his men, and had a right to see that they were not plundered, and could interpose to prevent extortionate rent; and that the employer had the right to stipulate by contract with his men where they shall not board, and where they may rent houses, and whatever the reason, good, bad or indifferent, no third party has a right to complain.²

Employment is the means of sustaining life to himself and family to the employee, and so he is morally though not legally compelled to submit. Capital may thus not only fund its own legitimate employment, but may control the employment of others to an extent that in time may sap the foundations of our free institutions. Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced, but public policy and all the best interests of society demand it shall be restrained within legitimate boundaries, and any channel by which it may escape or overleap these boundaries should be carefully but judiciously guarded. For its legitimate uses I have perfect respect; against its illegitimate use I feel bound, for the best interests both of capital and labor, to protest. In view of the legal reasons and authorities given, and these elements of a sound public policy, I think the rules I have maintained and authorities sustaining them are the better based in all the elements of sound rules of action that will best subserve the public interest, and at the same time do violence to no right that is exercised with a commendable or just motive, for a commendable and proper end will only restrain wrong and prevent conduct

that no sound judgment will approve as based on a sound morality. I therefore think the action *prima facie* maintainable, and the demurrer should be overruled."

¹ Heywood v. Tillson (1883), 75 Me. 225. In support of this proposition counsel for defendant relied upon the following cases: Bowen v. Matheson, 14 Allen, 499; Com. v. Hunt (1842), 4 Met. 111; Boston Glass Mfg. Co. v. Binney (1827), 4 Pick. 425; Greenleaf v. Francis (1836), 18 Pick. 117; Chase v. Silverstone (1873), 63 Me. 175; Frazier v. Brown (1861), 12 Ohio, 294; Chatfield v. Wilson, 28 Vt. 49; Wheatley v. Baugh (1855), 25 Pa. St. 528; Fernald v. Chase (1853), 37 Me. 289; Bowlin v. Nye (1852), 10 Cush. 416; Tucker v. Tarbell (1865), 11 Allen, 131.

² In this connection the court said: "The workmen may agree that they will not work for an employer 'who should, after notice, employ a journeyman who habitually used it' (liquor). Com. v. Hunt (1842), 4 Met. 111. A laborer would not be liable to a journeyman who lost employment by reason of such agreement, and the refusal of the employer any longer to hire him. So the master may equally impose as a condition that his servants shall not board at a house where liquors are kept for sale,

In conclusion the court, in *Heywood v. Tillson*, said that in that case there was no proof of any actual wrong done, of any legal damage, or of any facts for or on account of which damages could be assessed, there being no proof that any of the defendants' employees were influenced by the employer's threats.

§ 570. The right which a person has to refuse to have business relations with another, whether the refusal is based upon reason, whim, prejudice or malice, is limited to the individual

and the seller cannot maintain an action against him for the loss of profits on liquors he might have sold his boarders had they remained with him. He may impose as a condition of employment that certain associates and associations shall be avoided. Good habits are not all that is desirable. An interest in the success of an enterprise is required. The master may impose as a condition of employment that he shall not associate with one who is inimical to him — who is seeking to injure him — who is acting as a spy upon his proceedings, and who is libeling him in the newspapers. So the employer, as he may by contract stipulate with his men where they shall not board, may equally determine where and of whom they may rent the houses they may occupy, and where they may not. The house may be in an unhealthy part of the city, or a disreputable neighborhood. But whatever the reason, good, bad or indifferent, no one has a right to complain. The owner has no cause of complaint when one says he will not occupy his house, nor when another says he will refrain from doing an act if it be occupied. The defendant was under no obligation, owed no duty, to the plaintiff that he should permit his men to occupy his house, any more than to a boarding-house keeper that he should permit his men to board with him. The idea of a boarding-house keeper suing a man because he declines or refuses to employ his

boarders, or the owner of a house because he will not employ his tenants, is utterly at variance with the right of individuals to make their own contracts. A landlord has no right of action against an employer of men because he refuses to employ his tenants or boarders. Nor are his rights enlarged because the reason of such refusal is that they are his tenants or boarders. Neither is the employer liable if, having the tenants or boarders of a landlord in his employ, he discharges them from his service because they choose to remain such tenants or boarders, having the right by his contract with them to terminate their services. If he has not that right he may be liable to those so discharged. If he has, no one else has any right to complain because an employer having a right to discharge a servant does discharge him. The contract is between the master and servant, and the master is not obliged to retain his servant in his employ in such case, and no one else can bring a suit against him because he does not. The defendant has broken no contract. He has made none with the plaintiff. If the plaintiff has none with any one no contract is broken. If there be one, and the tenant has broken it, preferring to continue in the defendant's service, the tenant is liable for such breach. He is the one by whom the contract is broken. He is the principal in its breach. The defendant has done nothing."

action of the party who asserts the right. It is not equally true that one person may from such motives coerce another person to do the same thing. If the motive of the acts of the individual is to serve some legitimate interest of his own, then his acts are lawful, even though he injuriously affects the property or rights of another, so long as no definite legal right of such third party is violated; but if the individual combines with others for the express purpose of injuring a third party, then such combination is unlawful, even though the acts contemplated might be lawfully done by an individual alone, or by several individuals not acting in combination.¹

§ 571. Where the owners of seamen's boarding-houses in the city of Boston associated together and agreed that they would not ship seamen for less than certain rates of wages, and that they would use their best endeavors to prevent their boarders from shipping in any vessel when any of the crew of the vessel were from boarding-houses that were not in good standing with the association, the supreme court of Massachusetts held that it was not an actionable conspiracy for such an association to take their men out of ships because the men of a shipping-master not in good standing with the association were in the same ship, and to refuse to furnish sailors to such ship-master, and prevent men from shipping with him, and to notify the public that they were acting against him as shipping-master, and by notifying his customers and friends that such shipping-master cannot ship seamen for the association thereby injure and break up his business.² The reasoning of the court was as follows: The gist of the action is not the conspiracy, but the

¹ Delz v. Winfree (1891), 80 Tex. 400, 16 S. W. R. 111; Olive et al. v. Van Patten (1894), 7 Tex. Civ. App. 630, 25 S. W. R. 428. In the case last cited the plaintiffs owned a large sawmill and were large producers of lumber. The defendants were members of the Lumber Dealers' Association of Texas, which association adopted by-laws to the effect that if any manufacturer or wholesale dealer sold to any person not a dealer (railroad companies excepted) at points where there were dealers, such sale should be reported to the secretary of the

association, who would notify the members of the association, whereupon it was the duty of all members to discontinue their patronage with such manufacturer or wholesale dealer, etc. The plaintiffs having incurred the displeasure of the association, the latter sent a circular letter to nearly every lumber dealer in Texas requesting the dealers not to patronize plaintiffs, whereby plaintiffs were damaged.

² Bowen v. Matheson et al. (1867), 14 Allen, 499.

damage done by the alleged acts of the defendants, and the averment that the acts were done in pursuance of a conspiracy does not change the nature of the action.¹

Regarding the specific acts charged in the declaration the court enumerated them and commented upon them as follows:

1. That the defendants did take their men out of ships because the plaintiff's men were in the same. "We cannot see that this act is in itself unlawful. It does not appear that they were under any obligation to keep their men on board the same ship with the plaintiff's men, or violated the rights of the plaintiff or of any other person in taking them out."

2. That the defendants did refuse to furnish and ship men to him. "Such refusal is lawful in the absence of any legal obligation to furnish and ship men to him, and no such obligation is stated."

3. That the defendants did prevent men from shipping with him. "This might be done in many ways which are lawful and proper, and as no illegal methods are stated the allegation is bad."

4. That the defendants did notify the public that they had laid him on the shelf. "In another part of the declaration this is alleged to mean that the defendants 'were acting against him as aforesaid.' It does not appear to be slanderous, and therefore is not actionable."

5. That the defendants did publicly notify his customers and friends that he could not ship seamen for them. "This is not actionable, because it does not appear that he had a right to ship seamen for them."

6. That the defendants did interfere with his business as aforesaid; did prevent his getting seamen to ship; did prevent his getting employ as shipping-master; and did break up the plaintiff in his business and calling by their conspiracy, acts and doings, as aforesaid, and compel him to abandon his said business. "All this adds nothing to the substantial allegations of acts done by the defendants, but is to be regarded as alleging the consequences of the acts before alleged."

This case is one of those which mark the border line between civil conspiracies and legal combinations, and on first impression it seems to be well over the line on the side of civil con-

¹ Citing *Parker v. Huntington* (1854), 2 Gray, 124.

spiracies. The several defendants were acting in combination. The object of the combination was to maintain certain rates of wages for seamen. Among the means used to attain that object was the prevention by the combination of their own boarders from shipping in any vessel where any of the crew of the vessel were from boarding-houses the proprietors of which were not members of the association, and not in good standing with the association. So far both the object of the combination, and the means to be used, are not necessarily unlawful or oppressive, but the association went further, and refused to furnish sailors to a certain shipping-master, and sought to prevent men from shipping with him, and notified the public that they were acting against him. It is clear that the object of these various notices, taken in connection with the refusal to furnish men, was to cause injury to the objectionable shipping-master. The means used by the combination went beyond the mere advancing of its own interests, for the combination not only kept its own men from shipping with the shipping-master, but deliberately sought to prevent the shipping-master from securing men — in other words, sought to break up his business. To that extent the combination was a civil conspiracy, and the court is in error when it says that the gist of the action is the damage occasioned by the acts of the parties to the combination, and that the allegation that these acts were done in pursuance of a conspiracy is superfluous and immaterial.

§ 572. A trader may engage in the sharpest competition with his competitors and hold out extraordinary inducements to obtain business; he may represent his own wares to be better and cheaper than those of others, and he may exaggerate his own merits; but when he commits any act with the malicious intent of inflicting injury upon his competitor's business, his conduct is illegal, and, if damage results from it, the injured party is entitled to recover.¹

§ 573. If a combination use illegal methods or means to prevent dealers from selling supplies to parties not members of the combination, then a conspiracy exists, and damages sustained by dealers outside the combination may be recovered.²

¹ Van Horn v. Van Horn (1893), 56 N. J. Law, 318, 28 Atl. R. 669; Bowen v. Hall (1881), 6 Q. B. Div. 333. ² Cote v. Murphy et al. (1894), 159 Pa. St. 420, 28 Atl. R. 190.

§ 574. “**Blacklisting.**” — A combination of employers, the object of which is to wrongfully and maliciously prevent a discharged employee from obtaining employment, is a conspiracy.¹

The foregoing proposition as a general statement of the law is undoubtedly sound. Any combination the object of which is to oppress or injure another by wrongfully and maliciously preventing the other from securing employment is a conspiracy, whether such combination be an association of employers or an association of employees; but “blacklisting,” so called, is a means to an end, and is not in and of itself any proof of the legality or illegality of a combination.

“Blacklisting” is a term of comparative recent adoption in labor and legal literature.

In the case last cited, for instance, it was charged that the plaintiff had been a railway employee since he was seventeen years old; that for more than twelve years he worked continuously and steadfastly at his employment, and knew nothing of any other kind of work. He charged that the various trunk-line railroads of the United States had adopted various rules and regulations, which he designated as “blacklisting” rules, and it seems that under these rules and regulations it was the custom of the railroads to make a list of employees who had gone out on a strike; and in all “blacklist” cases it is charged that the railroad companies combined and agreed together to furnish one another copies of these blacklists, and not to employ any man whose name appeared thereon. The trial court, in holding that the plaintiff’s petition stated a good cause of action, did so upon the following general propositions:

1. “To maliciously interfere with the business of a person engaged in a lawful occupation, with injurious results, constitutes a ground of action or trespass on the case. Such interference may be by a single individual, or by a number of individuals conspiring together, and in the latter case the existence of the conspiracy should be considered as aggravating

¹ *Mattison v. L. S. & M. S. Ry. Co.* (1895), 8 Ohio Dec. 526. This is a decision by Judge Pratt in the Lucas county court of common pleas, and this decision, together with all decisions upon the subject of “blacklisting,” must be considered in the light of the propositions contained in the text. See charge to jury in same case, 8 Nisi Prius Dec. 190.

the wrong and enhancing the damages. To maintain a suit for the malicious interference with one's occupation it is necessary to prove: (1) Intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) actual damages and loss resulting."¹

2. "It is a part of every man's civil rights that he be left to refuse business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others he is entitled to redress. Thus, if one be prevented by the wrongful act of a third party from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequence of the wrongful act."²

3. "The employee's right to employment is equally assured with the right of the employer to employ him; it is not only a serious right, affecting a man's life, but you may say that it is his life. The laboring man's employment is the only thing that stands between him and starvation, or what is very little less than starvation — pauperism, and it is for the public interest and for the public good that the right of a man to seek his own employment in any honest work which he may seek should not be interfered with or violated."

4. The foregoing propositions do not interfere with the right of an employer to determine as to whom he will have work for him, and in the exercise of that right it makes no difference whether he refuses to employ a man because he is incompetent or because he dislikes him; but one man's right ends where another man's begins, and the right of the employer to discharge ends with his own service, and the employer must not trench upon the right of the employee to seek other employment. "It is, of course, a matter of public policy that a railroad company should have the right to employ such men as it sees fit, and to judge itself of the competency of its employees — there is no doubt about that. It is, however, for the public interest that a man who is skilful and who has be-

¹ From Webb's edition of Pollock on Torts, 406.

² Citing Cooley on Torts (2d ed.), 828.

come proficient in his employment should be able to find employment, if not with one railroad, then with another railroad, or some other railroad; at least that the field should be open to him — that he should have that right; and while a railroad company may discharge its men and not employ them themselves, they trench upon the rights of the employees whenever they, by one deed or another, seek to prevent their employees from getting employment of other railroad companies, or combine or conspire in any way to prevent it, as is charged in this petition, and the matters alleged in the petition are, on demurrer, to be taken as confessed.”

§ 575. Blacklisting — Rights and duties of employers as regards discharged employees.— The following general principles may be laid down as of controlling force in all so-called “blacklisting” cases:

(a) Where there is no continuing contract of employment an employer has the right to discharge employees at will.

(b) Where an employee is discharged for cause an employer has a right to make a record of that cause for future reference.

(c) Where an employee by his conduct, or by the manner of his leaving the service, threatens the destruction of property or the loss of life, it is the duty of the employer to make such a record of the conduct of the employee and the causes of his discharge as will serve for future reference and prevent the employee being unadvisedly taken back into the service.

(d) In a service of such importance to the public as the railway service, where not only the property of the company and of the public is immediately involved, but also the safety and lives of other employees and passengers are at stake, it is the duty of the railway company to exercise great care in the employment of its servants, and to exercise great diligence in inquiring into the ability, experience and records of its employees; any neglect of this duty which results in the destruction of property or loss of life renders the company liable for damages. It is also beyond question the duty of a railway company to keep such record of the conduct of its employees as will enable it to be fully advised at all times as to their capacity to perform any particular service, and as to their faithfulness and diligence; for any neglect of duty in this respect, whereby an incompetent, careless or evil-disposed employee

should be placed in a position wherein, by reason of his incompetency or evil disposition, damage results, the company would be liable.

(e) So far as passengers and the property of shippers are concerned, a railway company is charged at all times with such knowledge of the capacity, the faithfulness and the diligence of its employees as a reasonably diligent inquiry would disclose; and any company which negligently employs or retains an incompetent or evil-disposed employee is liable for any damage occasioned by the employee's incompetency or evil disposition.

(f) It is the right and the moral duty of an employer, and particularly a railway company, to answer truthfully all questions regarding the conduct and record of any discharged employee; it is especially the moral duty of railway companies to give this information to other railway companies to whom the employee may apply for work, since the withholding of information might not only subject the other companies to loss, but occasion loss and damage to the public.

(g) It is the right of officials of railway companies, in the honest endeavor to render the railway service of the company safe and efficient, to meet together and confer freely concerning all appliances used and all men employed, and to exchange views concerning the superior advantages of appliances and the desirability or undesirability of particular classes of employees. It is the right of such representatives of railway companies to agree that they will exchange information concerning appliances and employees, and it is as much their right to agree that they will exchange lists of employees who are discharged for inefficiency or bad conduct as it is to agree to exchange information concerning devices and equipment that prove defective. Providing the information so exchanged is truthful and given in good faith, an employee who finds himself unable to obtain employment because his conduct is thereby made known has no more ground for complaint than has the manufacturer of some railway device who finds the demand cut off by reason of such interchange of information.

It is believed that the foregoing propositions are sound. The difficulty in "blacklisting" cases arises when the representatives of the railroads enter into an agreement not only to ex-

change lists of discharged or striking employees with their records, but enter into the additional agreement not to give employment to any employee who has been discharged for a particular cause or who has been engaged in a strike.

§ 576. It is contended on behalf of the employees that a combination the object of which is to prevent men who have gone out on a strike from again finding employment in the occupation they have usually followed is a conspiracy to oppress and injure. This precise question is now before several courts as one of the many controversies arising out of the famous railway strike of 1894, wherein the American Railway Union, composed of large numbers of the railway employees of the country, sought to "tie up" all railroads entering Chicago, and practically all the railroads of the country, as a means to compel the Pullman Palace Car Company to advance the wages of its employees. The members of the American Railway Union had no controversy whatsoever with the several railroads with which they were employed, but they sought to inflict irreparable damage upon those roads in order to compel the roads to abandon the use of the Pullman cars. The strike was unsuccessful, and when many of the striking members of the union again sought employment with the several railroads they were met with refusal, whereupon many of them brought suits charging that the railroads had combined together and agreed to exchange lists of striking employees, and further agreed not to employ any such striking employees. The situation is novel in that the suits referred to are by members of a combination which was undoubtedly a criminal conspiracy. In pursuance of the objects of their own criminal conspiracy they quit the employment of the roads under circumstances calculated and intended to inflict the largest possible damage upon the roads. Failing in the attainment of their own unlawful objects they sue the roads for entering into a combination not to employ men who, as members of an unlawful conspiracy, sought to injure the railway companies, inconvenience the public, interrupt the United States mails and obstruct interstate commerce.

Assuming for the moment that the men struck in pursuance of the purposes of a conspiracy, is it unlawful for the railroads to combine and agree that they will not employ any parties to a conspiracy the object of which was to damage the railroads,

inconvenience the public, interrupt United States mails and obstruct interstate commerce?

The right of each road to exercise its discretion and judgment is unquestionable. It may even be urged that any road which should take back into its service any employee who had been engaged in a criminal conspiracy against the road is neglectful of its duty, and by the re-employment of such employee renders itself liable for any damage that may occur by reason of that employee's acting in the same manner under conditions of a similar character.

Furthermore, it may be laid down broadly that no employee who has been a party to a conspiracy to injure a road is in a position to complain if the road enters into an agreement with all other railroads to the effect that it will exchange lists of parties to conspiracies to injure, and will not employ men who have been engaged in such conspiracies. No man who has been guilty of theft or embezzlement, or of the derailment of cars, for instance, is in a position to complain if any number of railroad companies enter into an agreement that they will exchange lists of employees who have been guilty of such acts, and will not give employment to such employees. Such an agreement on the part of the companies would be not only the legitimate exercise of their own rights in the operation of their properties, but would exercise a wholesome, deterring influence against the commission of crimes and outrages of the character condemned.

A question somewhat nicer is presented when an employee is dismissed for causes that are neither unlawful nor criminal, or for striking to attain objects which are neither unlawful nor criminal. Assuming that a certain number of employees of a railway company, in the legitimate endeavor to increase their wages, go out upon a strike under conditions which inflict the least possible inconvenience and damage upon the company; in short, that the strike is both peaceful and lawful. Assuming further that, in order to discourage strikes of all kinds, the various companies through their superintendents or general officials have entered into an agreement that they will furnish, one to the other, lists of striking employees, and that no company will give employment to any striking employee unless the company with which the employee was formerly employed

gives its consent. Is such a combination a civil conspiracy, and has the employee who finds himself unable to obtain employment by reason of the existence of the agreement a cause of action for damages sustained?

In order that the mind may be free from bias let us assume a parallel combination on the side of labor: Suppose the employees meet and enter into an agreement that they will exchange lists of employers who at any time, for any purpose, have "locked out" their employees, and that they will not work for such employers, thereby rendering it impossible for employers who have at any time "locked out" their employees to obtain men, with the effect of ruining their business. Is such a combination of workmen a conspiracy, and would an employer have a cause of action for damages sustained?

In the light of the many decisions favoring combinations of labor for all purposes, it is believed that the courts would hold that employees have the right to assemble together and agree to exchange information as to the conduct of their employers, and to further agree that they will not work for any employer who at any time has "locked out" all or any number of his employees. Providing the laborers went no further than combining among themselves and agreeing among themselves to act as a unit, it is believed the courts would not hold their combination for such an object a conspiracy; if, however, the combination should go further and agree to exercise its powers as a combination to coerce and intimidate others in order to prevent their accepting employment with the objectionable employer, the combination would become a conspiracy. The same is true of the employers: if the combination of employers exercises its power as a combination in order to coerce other employers into refusing employment to particular workmen or a particular class of workmen, then the combination becomes a conspiracy and parties injured have their right of action for damages sustained.

Unless the courts are prepared to hold that employees who assemble together and agree to not work for any employer who has pursued any line of conduct objectionable to the employees amounts to a conspiracy, then the courts must hold that employers who meet together and enter into an agreement on exactly parallel lines are not parties to a conspiracy. The rights

of employers are no greater than the rights of employees; the rights of both are equal; what employees may do as against employers, the latter may do as against the former. Every combination of the one may be paralleled by a combination of the other. The right of men to meet, confer, exchange views and information, and to agree that as among themselves they will pursue a certain line of lawful conduct, is a right too sacred to be questioned or curtailed by either courts or legislature. It is neither the meeting nor the combination which the law investigates, but it is the object of the meeting and the purpose of the combination with which the law is interested. When the combination goes further than conference and mutual support in the attainment of some lawful purpose, and proposes to exercise its power as a combination to coerce and intimidate others in order to inflict some damage upon some party who is obnoxious to the combination, then the law intervenes on behalf of the party damaged. A combination of employees, the object of which is to discourage and prevent "lock-outs" and the wanton discharge of workmen by passing a resolution that members of the combination will not accept employment with any employer who has "locked out" or wantonly discharged his employees, is not an unlawful combination, neither the object nor the means being either unlawful or oppressive. A combination of employers, the object of which is to discourage strikes and the reckless abandonment of services by employees by passing a resolution to the effect that members of the combination will not give employment to any employee who has struck or recklessly abandoned his employment, is not an unlawful combination, neither the object nor the means being either unlawful or oppressive.¹

¹ There is pending in the supreme court of Illinois at the present time a "blacklisting" case entitled *McDonald v. Chicago & N. W. Ry. Co. et al.* In this case the demurrer to the declaration of the plaintiff was sustained in the trial court and this decision affirmed by a divided appellate court, only two judges sitting. The action is against the Chicago & Northwestern Ry. Co. and the Illinois Central Ry. Co., and the declaration alleges generally that the plaintiff was in the employ of the Illinois Central Ry. Co. for some time prior to the American Railway Union strike of 1894, but left the employ of the road at the beginning of the strike; that the various railroads of the United States agreed among themselves to furnish each other information concerning employees: First, those who had committed offenses; second, those who went out during

§ 577. But where there is a custom among railroad companies to keep a record of the causes for which employees have been discharged, and it is the custom for one company not to employ servants who have been discharged for certain causes by another company, it is the duty of the companies to keep true records, and in the event of the discharge of an employee on account of a false entry on such records, such employee has a right of action for damages resulting from the breach of this duty.¹

In order to recover under such circumstances the employee must allege that he actually sought employment, and by reason of such breach of duty was refused employment. It is not sufficient for him to aver generally that it is impossible for him to obtain employment by reason of the wrongful act of the company.²

the American Railway Union strike; third, those who were members of the American Railway Union; and the railroads further agreed that no one included in these lists would be employed without a "clearance" from the last employer; that after the plaintiff had left the service of the Illinois Central Ry. Co. that company communicated to the other railroad company the fact that the plaintiff had left during the American Railway Union strike, and refused to give him a "clearance," so that when he applied to the Chicago & Northwestern Ry. Co. for work that road declined to employ him. It was claimed by the plaintiff that this alleged agreement constituted a conspiracy. "Which said conspiracy and agreement so entered into as aforesaid was a conspiracy and agreement to blacklist and boycott such employees, the object and purpose of which conspiracy and agreement was to maliciously and wantonly interfere with such employees who had so previously terminated their employment with, or been discharged from the employment of, either of said railroad companies, in and about

obtaining employment with any of said railroad companies in the city of Chicago."

In his brief filed in the supreme court counsel for plaintiff said: "The writer does not doubt the right of the different railroads to report each to the other the names of their drunken and careless employees. Owing to the *quasi*-public nature of the railroad business and the fact that people jeopardize their lives and property every time they take a train or ship property, the public is interested in having careful, sober men operate the railroads; and for that reason, if for no other, it is not only the right, but the solemn duty, of railroads to report each to the other the names of their careless and drunken employees, so that they may be effectually prevented from engaging in the railroad business."

¹ *Hundley v. L. & N. R. Co.* (1898), 48 S. W. R. 429.

² *Hundley v. L. & N. R. Co.*, *supra*. In this case the court said concerning the issues: "It is averred in the petition as amended that the plaintiff has no trade or calling except railroading; that for the past five

Regarding the rights and duties of a railroad company in connection with the employment and discharge of its employ-

years he has been in the employment of the defendant; that while engaged in the discharge of his duties he was wrongfully, unlawfully and maliciously discharged by it; that it wrongfully, unlawfully and maliciously blacklisted him; that he was blacklisted wrongfully, unlawfully, maliciously and falsely by its placing upon its records a pretended cause of discharge, to wit, neglect of duty, with a view of injuring and preventing him from entering its employment or that of other railroad companies; that it had entered into a conspiracy and combination with other railroad companies by which its employees discharged for cause will not be given employment by other railroad companies; that, on account of its false and malicious acts and its conspiracy with other railroad companies, he has been deprived of the right to again engage in the employment of the defendant or other railroad companies; that the wrongful acts mentioned were committed for the purpose of making, and had made, it impossible for him to ever again get employment from the defendant on any of its lines, or from other railroad companies in the United States; and that he has been damaged thereby in the sum of \$5,000." Regarding the novelty of the case and general principles governing it, the court said: "Our attention has not been invited to, nor have we been able to find, any reported case involving exactly the same question as is involved in this case. It is a novel question in this court, although there are reported cases of other courts the doctrine of which might be applied to this case. As the population of the country increases, as the business and commercial industries multiply, as inventive

genius causes civilized peoples of the world to marvel at its discoveries and productions, as space is annihilated by the means of rapid transit for man, commerce, thought and sound, thus facilitating the pursuit of occupations and callings, and the promotion of the social and political intercourse of the world, courts are called upon to apply familiar principles to new questions; if none seem to be applicable, to enunciate a just rule, suited to the state of facts before it and for future application to similar facts. It can never be said that the novelty of a complaint is an objection to the action, if it is made to appear that an injury has been inflicted of which the law is cognizable. The familiar maxim of the law, '*Ubi jus, ibi remedium*,' is considered valuable by all courts. It was this maxim which caused the invention of the form of action called 'an action on the case.' It is the part of every man's civil rights to enter into any lawful business, and to assume business relations with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice or malice. If he is wrongfully deprived of these rights he is entitled to redress. Every person *sui juris* is entitled to pursue any lawful trade, occupation or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation or calling, and be protected in it, as is the citizen in his life, liberty and property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. For every injury suffered by reason of a violent or malicious act done to a man's occupation, profession, or way

ees, the court of appeals of Kentucky said:¹ "A railroad company has the right to engage in its service whomsoever it pleases, and, as part of its right to conduct its business, is the right to discharge any one from its service, unless to do so would be in violation of contractual relations with the employee. It is the duty of a railroad company to keep in its service persons who are capable of discharging their important duties in a careful and skilful manner. The public interest, as well as the vast property interests of the company, require that none other should be employed by it. Its duty in this regard and its right to discharge an employee does not imply a right to do a violent or malicious act which results in the injury of the discharged employee's calling. The company has the right to keep a record of the causes for which it discharges an employee, but in the exercise of this right the duty is imposed to make a truthful statement of the cause of the discharge. If, by an arrangement among the railroad companies of the country, a record is to be kept by them of the causes of the discharge of their employees, and when they are discharged for certain causes the others will not employ them, it becomes important that the record kept should contain a true statement of the cause of an employee's discharge. A false entry on the record may utterly destroy and prevent him from making a livelihood at his chosen business. Such false entry must be regarded as intended to injure the discharged employee; therefore a malicious act. If it is the custom of the railroads of the country to keep such record, and that employees discharged for certain causes are not to be employed by them, then it enters into, and forms part of, every contract of employment that neither a false entry shall be made, nor one so made communicated, directly or indirectly, to any other railroad company. Suppose it was the custom of the railroads, when an employee was discharged with-

of getting a livelihood, an action lies. Such an act is an invasion of legal rights. A man's trade, occupation or profession may be injured to such an extent, by reason of a violent or malicious act, as would prevent him from making a livelihood. One who has followed a certain trade or calling for years may be almost unfitted for any other business. To deprive

him of his trade or calling is to condemn not only him, but perchance a wife and children, to penury and want. Public interests, humanity and individual rights, alike, demand the redress of a wrong which is followed by such lamentable consequences."

¹ *Hundley v. L. & N. R. Co.* (1898), 48 S. W. R. 429.

out cause, to give him a card or statement to that effect, and if he did not have such card or statement he could not get employment with other railroad companies, then that custom would enter into every contract of employment; and if a company wrongfully refused to give it to the discharged employee, and in consequence of which refusal he was injured, a cause of action would lie for the damages sustained. For such breach of duty the employee could maintain an action *ex contractu* or *ex delicto*, at his option. Addison says: 'A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought at the option of the plaintiff.' It was one of the purposes of the common law to protect every person against the wrongful acts of every other person, and it did not matter whether they were committed by one person or by a combination of persons, and under it an action was maintainable for injuries done by disturbing a person in the enjoyment of any right or privilege which he had."¹

§ 578. "Clearance," or certificate of character.— Courts will take judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is con-

¹In conclusion the court said: "The petition does not state a cause of action against the defendant. The averments that he had been deprived of the 'right' to again engage in the employment of other railroad companies, and that the alleged wrongful act had made it impossible for him to ever again get employment with other railroad companies, are mere conclusions of the pleader from the facts alleged. It should have been averred that he had sought, and been refused, employment by reason of the alleged wrongful act. An agreement made with other railroad companies not to employ defendant's discharged employees does not injure the plaintiff unless carried out. An averment that the defendant

conspired and combined with other railroad companies to do an act, if unlawful, would not obviate the necessity of making the averment that he had sought and been refused employment by reason of the alleged wrongful act. Injury is the gist of the action. The liability is damages for doing, not for conspiracy. The charge of conspiracy does not change the nature of the act. In an action for damages there must be some overt act, consequent upon the agreement to do a wrong, to give the plaintiff a standing in a court of law. Jag., Torts, 638; Cooley, Torts, 279. For the reasons given the judgment sustaining a demurrer to the petition is affirmed."

ducted, and of the every-day, practical operation of railroads in this country.¹

A "clearance" card is simply a letter given to an employee at the time of his discharge, or the end of his service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as will give to those concerned information concerning his former employment. Such card is in no sense a letter of recommendation, and in many cases might be of such a character that the holder would hesitate and decline to present it when applying for employment.²

By the common law no duty is imposed upon an employer to give an employee either a letter of recommendation or a "clearance" card.³

¹ C., C., C. & St. L. Ry. Co. v. Jenkins (1898), 174 Ill. 398, 51 N. E. R. 811; Slater v. Jewett, 85 N. Y. 61, 5 Am. & Eng. Ry. Cas. 515; Smith v. Potter, 46 Mich. 258, 2 Am. & Eng. Ry. Cas. 140, 9 N. W. R. 273.

² C., C., C. & St. L. Ry. Co. v. Jenkins (1898), 174 Ill. 398, 51 N. E. R. 811.

³ C., C., C. & St. L. Ry. Co. v. Jenkins (1898), 174 Ill. 398, 51 N. E. R. 811; Smith on Master and Servant, 347; Carroll v. Bird (1800), 3 Esp. 201. In the Illinois case above cited the supreme court said: "A character is not given for the benefit of the ex-employee, although he may be either injured or benefited by reason of such a character being given; nor does the right to give such a character arise out of a duty to the employer; but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employee has a legal right to demand it. Such communications have been made not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good and as a moral duty

to society, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information. (Citing *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Moot v. Dawson*, 46 Iowa, 533; *Townshend on Slander and Libel* (4th ed.), 395-397; 13 Am. & Eng. Ency. of Law, pp. 415, 416; *Bacon v. Michigan Central R. R. Co.*, 81 Am. & Eng. Ry. Cas. 357.) In *Parsons on Contracts* (page 328) the author says: 'The master is under no legal obligation to give a testimonial of character to his servant.' It is also a well-known rule of law that no man is compelled to enter into business relations with any other person unless he desires so to do, and it is also as well established that upon the dissolution of such business relations no man shall be compelled to divulge to the public his reasons, good or bad, for such dissolution. In *Cooley on Torts* (page 328) it is said: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, ca-

It has been held by a trial court¹ that where railroad companies agree that they will not re-employ any employees who have been discharged from the service of the company or who have quit the service, or who have gone out upon a strike while in the service of the companies, unless the applicant shall present a consent from the company for which he last worked, or a "clearance" showing that he was not engaged in a strike, it is the duty of the company, upon the discharge of an employee who did not engage in such strike, to furnish him a "clearance" card upon his application therefor, and a failure to do so, whereby he is prevented from obtaining employment with another company, constitutes an actionable wrong; and if such "clearance" or consent be withheld maliciously, exemplary damages may be awarded.

The fact that an employer requires letters of recommendation from persons seeking employment is no reason why he should be legally compelled to give such letters to those leaving his employment; and where it was alleged that it was the usage and custom in certain employments to give such letters, proof of such usage must be clear. It is not sufficient to prove simple instances of the giving of such letters, but the custom must be established as a matter of fact, and must be so certain, uniform and notorious as to be known to and understood by the parties at the time of entering into their contract, so as to become part of the contract.²

price, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.' A further citation of authorities is unnecessary to establish that by common law no liability was imposed upon the master to issue any form of character to his servant. By statute no duty is imposed upon the employer to give to an employee a clearance card, nor does any right to demand such accrue to the employee. Therefore, if any cause of action exists to the appellee in this case, it must arise out of his contract of employment, or there must be shown and established such a custom or usage as would clearly entitle him to such. Under such views of the

subject-matter involved in this case, where no action, either by law or by statute, accrued to the plaintiff, it was necessary for him to produce, in the first instance, evidence tending to show that a usage or custom existed on appellant's railroad, at the time of his contract of employment, to give to each discharged employee, or those voluntarily quitting its service, a clearance card or certificate of evidence, and tending to show he was entitled to it under his contract of employment."

¹Shaffer v. N. Y. C. & St. L. R. Co., 17 Ohio Cir. Ct. Rep. 77 — this case is now pending in the supreme court of Ohio.

²United States v. Duval (1833),

§ 579. **Action for conspiracy to do a lawful act.**—It has been held that action will not lie against officers of insurance companies who combine and conspire wilfully and maliciously to injure the owner and commander of a steamboat by refusing without cause to take insurance upon his boat, whereby he is deprived of his occupation and compelled to sell his boat.¹ The authority of this case may well be doubted. Counsel for complainant contended that “A combination to ruin and impoverish a man in his business is unlawful *per se*. A baker may refuse me and my family bread, but the bakers of a city cannot lawfully combine and confederate, to the end that I get no bread. So an insurance company may refuse to underwrite for me, but underwriters may not combine and confederate to deny me insurance—to break up my vocation. The demurrer in this case admits that the combination was malicious, and for the purpose of ruining the plaintiff in his business, and that this purpose was accomplished.” This contention is sound.²

Gilp. 336, Fed. Cas. No. 15,015; Dean v. Swoop (1809), 2 Binn. 72; Janney v. Boyd (1883), 30 Minn. 311; Taylor v. Mueller (1883), id. 843; Allen v. Merchants' Nat. Bank (1839), 22 Wend. 215; Chesapeake Bank v. Swain (1868), 29 Md. 483; Bissell v. Ryan (1860), 23 Ill. 506; Wilson v. Bauman (1875), 80 id. 493; Turner v. Dawson (1869), 50 id. 85; Packer v. Van Schoick (1871), 58 id. 79; Papin v. Goodrich (1882), 103 id. 86. The act requiring railway corporations to give their discharged employees a statement of the causes of their discharge is unconstitutional. “A statute which undertakes to make it the duty of incorporated railroad, express and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture under the name of damages for failing or refusing so to do, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of

no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for the private information cannot be coerced by a mere legislative mandate by the will of one of the parties and against the will of the other.” Wallace v. Railway Co. (1894), 94 Ga. 732, 22 S. E. R. 579.

¹ Hunt v. Simonds et al. (1854), 19 Mo. 583.

² The court in its opinion said: “It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others. Innkeepers, who are bound to entertain strangers, and common carriers, who are bound to undertake the transpor-

tation of goods, are among such exceptions. But such is not the obligation of underwriters. The business of insuring is but a game of hazard, and there are a great many elements entering into the calculations upon which it can be safely pursued. The seaworthiness of every vessel upon which insurance is asked is made up of its staunchness and suitable equipment, and the skill, competency and fidelity of its officers and crew; and upon each of these points, very different opinions may be entertained by different persons, as is shown by the cases in which such questions have been in controversy. A man may possess the requisite skill to command a boat, and yet an underwriter may be unwilling to take the hazard of his fidelity, although it may be impossible to prove any particular act

of misconduct. While, in the present case, we are to take the plaintiff to be, as is alleged in his petition, a skilful, competent and faithful commander, yet the right of the defendants still remains unaffected, which is to decide for themselves whether they will put their money at risk or not by insuring upon property under his charge. To assert the contrary is to assert that underwriters are bound in law to insure property whenever insurance is asked, and the vessel is staunch and well equipped, and provided with competent and faithful officers and crew. If, under such circumstances, they are not bound to insure, then the refusal to insure is not the denial of any right belonging to the owner of the property upon which insurance is sought."

CHAPTER 15.

SIMPLE COMBINATIONS.

- § 580. American cases of illegal combinations of capital.
- 581. Simple combinations — Definition of.
- 582. Trusts — Definition of.
- 583. Corporate combinations — Definition of.
- 584. Evolution of the simple combination.
- 585. Cases of simple combinations held illegal.
- 586, 587. Combination of boat owners.
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- 597. Combination of milk dealers.
- 598. Combination of candle-makers.
- 599. Combination among buyers of sheep.
- 600. Combination of salt producers.
- 601. Combination of local grocerymen.
- 602. Combination of carbon manufacturers.
- 603. Combination of lumber manufacturers.
- 604. Combination of wire-cloth manufacturers.
- 605. Combination of tobacco warehousemen.

§ 580. American cases of illegal combinations of capital.— In considering the law of illegal combinations of capital as laid down by the courts of this country it will be convenient to group the cases in three broadly distinguished classes, according to the character of the combinations involved:

1. Simple combinations.
2. Trusts.
3. Corporate combinations.

§ 581. Simple combinations — Definition of.— Combinations formed by voluntary association, contract, agreement or arrangement, where there is no sale, purchase, lease or transfer of any interest of any of the constituent companies or parties, but each member, whether individual, partnership or corpora-

tion, retains its own identity and property, but manages its business according to the terms of the agreement constituting the combination.

§ 582. Trusts — Definition of.— Combinations formed by creation of a trust wherein the trustees, or trustee body or trustee corporation, hold the stock of the constituent corporations with power to vote the same, and so control the several corporations, issuing, as a rule, against the stock so held, certificates of stock of the trustees, trustee body or trustee corporation.

§ 583. Corporate combinations — Definition of.— Combinations formed by the sale or lease of the properties, assets and good will of the several parties or corporations to one large corporation organized for the purpose of acquiring the several properties.

§ 584. Evolution of the simple combination.— Most forms of co-operation, whether partnerships, associations or corporations, are simple combinations. Every pooling arrangement and every agreement whereby two or more men, or two or more firms, or two or more corporations, agree to co-operate in any manner for the advancement of their interests is a simple combination. The simplest combination conceivable is the co-operation of two individuals. The bond or agreement which holds them together may be of a very intangible character, but so long as they co-operate together to attain any object they are in combination. Between this simplest of all combinations and a combination of great magnitude and far-reaching effects the varieties of simple combinations are innumerable. The evolution of the simple combination can be traced in the economic tendency of men to make use of the advantage of co-operation. The law recognizes the great advantage of co-operation by sanctioning partnerships and authorizing corporations.

§ 585. Cases of simple combinations held illegal.— In many of the cases about to be reviewed of simple combinations held illegal for the various reasons assigned, it will be difficult to distinguish clearly any illegal element. It is apparent that the courts are frequently influenced by the mere size and power of the combination. No rule can be laid down which will clearly classify these cases of illegal simple combinations by

themselves as distinguished from the innumerable cases of legal simple combinations. In a small town a simple partnership may dominate the entire place, or a single corporation may control an entire industry. In a much larger territory — in a state, for instance — two or three individuals associated together may control an important industry, or one large corporation, by legitimate growth and expansion in its business, may control the entire field, and yet these combinations are upheld and taken as a matter of course. People of a town or village are quite apt to point with pride to the man who, by shrewdness and sagacity united with good fortune, has acquired such wealth as to actually own all the flour-mills or all the saw-mills in the locality, or to the firm that by skilful management has secured practically the control of the general merchandise business of the place. One corporation may control the entire lumber industry of a very large area, or, the entire mining industry, to such an extent that the welfare of entire villages may depend upon the judgment or the caprice of the individuals controlling the corporations. Nothing is more frequent than for one firm to buy out and absorb another, or for one corporation to buy out and absorb another, and this process goes on everywhere until in many states particular firms, and especially particular corporations, attain great power and magnitude. The courts never hesitate to enforce the contract whereby an individual, or a firm, or a corporation agrees to sell its assets to another¹ firm or corporation. In short, legislatures not only sanction the formation of simple combinations, but the courts compel the specific performance of agreements the object of which is the organization of simple combinations. The cases about to be reviewed must be considered in the light of these general considerations; and while some of the cases may disclose elements of a conspiracy, most of them simply show the efforts of men to co-operate together for mutual benefit, without any intent to do that which is unlawful or oppressive, unless it is to be laid down as a proposition of

¹ The exceptions to this proposition franchise, or upon some other ground in cases where corporations are restrained from disposing of their entire assets on the ground that it amounts to an abandonment of their peculiar to corporation law, are entirely aside from the present discussion.

general validity that the intent to raise prices and control trade is an unlawful intent and an oppressive intent. In the light of the cases of legal combinations of capital and of the cases of legal combinations of labor, it cannot be said that the intent to increase prices is either unlawful or contrary to public policy.

§ 586. **Combination of boat owners.**¹—An agreement whereby the whole or a large portion of the proprietors of boats on certain canals regulated the rates of freight and passage by a uniform scale, which scale was established by a committee selected from among the proprietors, and whereby it was provided that the proprietors' business should be divided in proportion to the number of boats employed by each proprietor, and whereby it was also provided that members should not engage in similar business outside the association, is illegal upon the grounds:

- (1) The tendency of such agreement is to increase prices;
- (2) The tendency is also to prevent competition.²

¹ *Stanton v. Allen* (1848), 5 Denio, 434.

² "The articles of association bore date Albany, July 31, 1843. They were signed by the proprietors of thirty-five rate *lines* of transportation on the canals. The defendant signed as proprietor of 'John Allen's Clinton line.' The articles commenced by stating that 'the undersigned forwarders on the canals in the state of New York, for the purpose of *establishing fair and uniform rates of freight*, so equalizing the business among themselves as to avoid all unnecessary expense in doing the same,' had agreed 'to stock all the earnings of all the boats of all the parties' thereto; and for the management of the business had agreed upon the articles which followed." The court said: "It is to be settled, therefore, whether the articles of association produced by the defendant were illegal and void as against public policy. The association was formidable and imposing,

consisting as it did of the members of all the transportation lines on the Erie and Oswego canals at the time. Its professed object and purpose was the establishment of fair and uniform rates of freight, and to equalize the business among the members. These rates were to be determined by a committee and to extend to the transportation of both freight and passengers. While the introductory terms of the agreement proposed nothing apparently objectionable, the ultimate object is very manifest and is of a different character. It is nothing less than the attainment of an exemption of the standard of freights, and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition. To produce that end more completely, each member binds himself not only to run all his present boats according to the agreement and turn their earnings into the common stock, at the rates agreed upon, and at which rate

§ 587. Where rival and competing steamboat companies, organized under the laws of the state of New York, act together and enter into an agreement for the purpose of running the boats of their respective lines for joint account, thereby making a complete union of the interests of the companies, such combination is illegal under the section of the incorporation act which provides that "no such company shall combine with any other company formed under this act for any purpose." Such combination is also illegal as creating a monopoly and contrary to public policy.¹

Where the owners of two competing steamboats enter into an agreement that they would thereafter share in fixed proportions in the net profits of both boats, and providing that in the event of either boat being sold to go out of the particular trade, the owner so selling should not come back into the trade again within one year thereafter, such an agreement is illegal, the object being to destroy or interfere with competition.²

An agreement whereby one steamship company agrees to pay to another certain sums of money as consideration for the others agreeing not to enter into competition upon a certain

he is to be charged in the final distribution, though he may have received or charged less, but he is also prohibited, under severe penalties, from employing on any other terms boats subsequently acquired. Besides, as much as possible to secure the exclusion of others from their fair share of business, each party is bound, if he shall have more freight than he can carry, to offer it to some of the associates; and if they do not take it, he is then authorized to procure its transportation without limitation as to rate, and after taking out the freight and certain charges for risk and trouble to turn in the balance to the common stock. The association being thus secured against internal defection and external encroachments, and the members having thrown their concerns into stock to derive an income in proportion to the number of shares they hold, and not according to their merit and ac-

tivity in business, and safe against the reduction of compensation that would otherwise follow mean accommodations and want of skill and attention, the public interest must necessarily suffer grievous loss. Indeed the consequence of such a state of things would shortly be, that freighters and passengers would be ill-served, just in proportion as the carriers were well paid. The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the great preservative principles of a state. Sound morality is the corner-stone of the social edifice. Whatever, therefore, disturbs that is condemned under that fundamental rule."

¹ *Watson v. Harlem & N. Y. Nav. Co. et al.* (1877), 52 How. Pr. 848.

² *Anderson v. Jett, etc.* (1889), 89 Ky. 375, 12 S. W. R. 670.

steamship route is illegal and void, and the stockholders in the former company may restrain the paying of the money.¹

§ 588. **Combination of dealers in cotton bagging.**² — Where a number of commercial firms enter into an agreement not to sell any India cotton bagging for a specified time, except with the consent of a majority of the combination, such an agreement is void and cannot be enforced.³

A contract giving the exclusive sale of grain bags and burlaps for a certain period is entirely valid, unless it appears that such contract is a part of a conspiracy to create a monopoly.⁴

§ 589. **Combination of grain dealers — Secret and fraudulent.**⁵ — Where the grain dealers of a certain town enter into a contract, the apparent object of which was to form a partnership for the dealing in grain, but the true object of which was to form a secret combination to suppress competition and enable the parties to control the price of grain, rates of storage and shipment, such combination is illegal. The facts as recited by the courts in this case disclose a secret and fraudulent purpose. "Prior to and up to the time of the execution of the agreement set out in the bill, the four parties were engaged in the grain business in the town of Rochelle, each one on his own account, and in competition with each other, but, after the agreement was executed, all competition ceased. All the warehouses in the city, and every lot suitable to erect a warehouse upon, were controlled by the combination. Some were purchased and others leased, so that the combination formed effectually excluded all opposition in the purchase, sale, storage and shipment of grain in that market. Secret meetings were

¹ *Leslie v. Lorillard et al.* (1886), 40 Hun, 892.

² *India Bagging Ass'n v. Kock* (1849), 14 La. Ann. 164.

³ The court said: "This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order and cannot be enforced in a

court of justice. Citing *Merlin. R. de Jurispr.*, verbo *Monopole*; *Blackstone's Com.*, B. 4, ch. 12, §§ 8 and 9; *Chitty on Cont.* (ed. 1865), p. 678; 1 *Smith's Lead. Cas.* 367, 381; *French Penal Code*, art. 419; *Pardessus, Droit Comm.*, vol. 1, p. 265; *Lang v. Weeks*, 2 Ohio St. (N. S.) 519; *Thomas v. Tiles*, 3 Ohio, 274.

⁴ *Pacific Factor Co. v. Adler* (1891), 90 Cal. 110, 27 Pac. R. 86.

⁵ *Craft et al. v. McConoughy* (1875), 79 Ill. 346.

held in the night-time by the parties to the contract, at which the price to be paid for grain was agreed upon, rates for storage and shipment fixed, in order that the public should be kept in ignorance of the plans and operations of this illegal combination. To the public the four houses were held out as competing firms for business. Secretly they had conspired together, and were working in a common cause, in the sole interest of each other. The language used in the contract itself leaves no room for doubt as to the purpose for which the agreement was entered into, as a few extracts will show: 'Each separate firm shall conduct their own business as heretofore, as though there was no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain and furnish their own funds to do business with.' . . . 'Prices and grades to be fixed from time to time, as convenient, and each one to abide by them. All grain taken in store shall be charged one and one-half cents per bushel, monthly.' . . . 'No grain to be shipped by any party at less rates than two cents per bushel.' While the agreement, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country."

§ 590. **Combination of brewers.**¹ — Forty-five individuals, firms and corporations engaged in the business of brewing in the city of Philadelphia, entered into a combination to regulate and control the price of beer within that city and adjoining territory. The combination included all the brewers in Philadelphia with one exception. It was an unincorporated association and known as the Brewers' Pool. "The agreement by the fifth section provides that 'the undersigned hereby stipulate and bind themselves one to the other, and do hereby agree, one with the other, not to sell and deliver any beer in

¹ *Nester et al. v. Continental Brew- S. C. on appeal, 161 Pa. St. 473, 29 ing Co. et al. (1894), 2 Dist. R. 177; Atl. R. 102.*

the city and county of Philadelphia, and Camden and Camden county, New Jersey, or which is to be used in the city and county of Philadelphia, Camden and Camden county, New Jersey, after July 1, 1886, to any new trade or any other brewers' customer or customers that belong to this association, during the continuance of this agreement, at less than \$8 a barrel.' For the violation of this agreement the severest penalties are then provided. By the sixteenth article: 'The board of trustees may call the association together from time to time, and at any such meeting the price at which beer may be sold may be changed by a vote of not less than two-thirds of all the members belonging to said association at the time of voting thereon.' The agreement and combination were held illegal in the district court upon the following grounds:

(1) That it was a combination in restraint of trade, tending to destroy competition and to create a monopoly in an article of daily consumption.

(2) That the power given to the pool to arbitrarily fix the price necessarily controlled production, and was contrary to public policy.¹

¹ "Where a price is fixed arbitrarily for which a manufactured article may be sold, it necessarily limits the production of that article to the amount that can be sold for that price. An increased price put upon an article restricts its sale, and the restricted sale necessarily reduces the production. It is no answer to say we do not restrict your production; you may produce any amount you like,—we only restrain your sale of it. Is this not practically a limit to production? Where a pool or combination reserves the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly, and enhance at their pleasure the prices to consumers. It is also contended here by the complainants that the consideration is executed, and therefore, in accordance with a line of cases, the illegal nature of the original transaction will not be in-

quired into. The test, however, as to whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case; if the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him." Citing *Swann v. Scott* (1824), 11 S. & R. 155; *Morris Run Coal Co. v. Barclay Coal Co.* (1871), 68 Pa. St. 155, 173. In support of the proposition that "the agreement under which the Brewers' Association was formed does not impose an unreasonable restraint upon trade, nor inflict any injury upon the public, and is therefore not illegal as against public policy," the following cases were cited: *Swann v. Swann*, 21 Fed. R. 301; *Baker on Monopolies*, 107, 207; *Bruce Smith on Liberty and Liberality*, 187; *Ray, Cont. Lim.* 197; *Gompers v. Rochester* (1867), 56 Pa. St. 194; *Mo-*

“So it is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, nor the extent of space included in the combination, but upon the exist-

Clurg's Appeal (1868), 58 Pa. St. 51; Hall's Appeal (1869), 60 Pa. St. 458; Harkinson's Appeal (1875), 78 Pa. St. 196; Paxson's Appeal (1884), 106 Pa. St. 429; Smith's Appeal (1886), 113 Pa. St. 579; Shirley v. Keagy (1889), 126 Pa. St. 282, 17 Atl. R. 607; Raub v. Van Horn, 133 Pa. St. 573, 19 Atl. R. 704; Horner v. Graves, 7 Bing. 735; Nav. Co. v. Winsor (1873), 87 U. S. 64; People v. Sugar Refining Co. (1889), 54 Hun, 354; Skrainka v. Scharringhausen (1880), 8 Mo. App. 522; Collins v. Locke, L. R. 4 App. Cas. 674; Wickens v. Evans, 3 Younge & Jervis, 318; Fairbanks v. Leary (1876), 40 Wis. 637; Ontario Salt Co. v. Merchants' Salt Co. (1871), 18 Grant's Ch. R. 540; Central Shade Roller Co. v. Cushman (1889), 143 Mass. 358, 9 N. E. R. 629; United States v. Trans-Missouri Freight Ass'n (1892), 63 Fed. R. 440.

In support of the counter proposition that “the contract or agreement in question created a monopoly by restricting competition and controlling the price of an article of commerce, and was therefore void at common law as against public policy,” counsel relied upon act of congress of July 2, 1890, 26 St. at L. 209; Spelling on Trusts and Monopolies, 75; Patterson on Cont. in Restraint of Trade, 51; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Mitchell v. Reynolds, 1 P. Wms. 181; Horner v. Graves, 7 Bing. 735; Scranton Elec. Light & Heat Co.'s Appeal (1888), 122 Pa. St. 154, 15 Atl. R. 446; More v. Bennett (1892), 140 Ill. 69, 29 N. E. R. 888; Cummings v. Foss (1890), 40 Ill. App. 523; Craft v. McConoughy (1875), 79 Ill. 346; People v. Chicago Gas Trust Co. (1889), 130 Ill. 268, 22 N. E. R. 798; Emery v. Ohio Candle

Co. (1890), 47 Ohio St. 320, 24 N. E. R. 660; Hoffman v. Brooks, 23 Am. Law Reg. 638; Collins v. Locke, L. R. 4 App. Cas. 674; Central Ohio Salt Co. v. Guthrie (1880), 35 Ohio, 666; DeWitt Wire Cloth Co. v. New Jersey Wire Cloth Co. (1891), 16 Daly, 529; Strait v. Nat. Harrow Co., 18 N. Y. Supp. 224; Arnot v. Coal Co. (1877), 68 N. Y. 558; Pittsburg Carbon Co. v. McMillin (1890), 119 N. Y. 46, 28 N. E. R. 530; Judd v. Harrington (1892), 19 N. Y. Supp. 413; Richardson v. Buhl (1889), 77 Mich. 632, 43 N. W. R. 1102; Santa Clara M. & L. Co. v. Hayes, 76 Cal. 387; Pacific Factor Co. v. Adler (1891), 90 Cal. 110, 27 Pac. R. 86; India Bagging Ass'n v. Kock (1849), 14 La. Ann. 164; T. & P. Ry. Co. v. South Ry. Co. (1889), 41 La. Ann. 970, 6 S. R. 888; Clancy v. Salt Mfg. Co., 62 Barb. 407; Hilton v. Eckersley (1855), 6 E. & B. 47; Gibbs v. Cons. Gas Co. of Brooklyn (1889), 130 U. S. 396; Nav. Co. v. Winsor, 20 Wall. 64; Texas Standard Cotton Oil Co. et al. v. Adoue et al. (1892), 83 Tex. 650, 19 S. W. R. 274; Stanton v. Allen (1848), 5 Denio, 434; Hooker & Woodward v. Vandewater (1847), 4 Denio, 349; Anderson v. Jett (1889), 89 Ky. 375, 12 S. W. R. 670; Wiggins Ferry Co. v. C. & A. R. R. Co. (1878), 5 Mo. App. 346; Stewart v. Transportation Co. (1871), 17 Minn. 372; Atchenson v. Mallon (1870), 43 N. Y. 147; Rannie v. Irvine (1844), 7 M. & G. 969.

On appeal the supreme court of Pennsylvania said: “The test question in every case like the present is, whether or not a contract in restraint of trade exists which is injurious to the public interests. If injurious, it is void as against public policy. Courts will not stop to inquire as to

ence of injury to the public. One combination consisting of but part of those engaged in a given branch of trade may amount to a practical monopoly; while another, less extensive in its scope, may, as well, bring disaster in its train. The difference lies only in degree, but equally forbids the aid of courts."

The court, however, notes the distinction between a simple combination which is the association of more or less independent units, and a combination effected by the purchase outright of competing properties.

§ 591. But the supreme court of Texas¹ held that a combination of persons and firms in a city for the control of the sale of beer and the cessation of competition *inter se* is not void at common law as against public policy, although in restraint of trade, since beer is not an article of prime necessity, and its sale is closely restricted by public policy, but that the combination was contrary to the Texas act of 1889 relating to conspiracies against trade.²

the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious."

¹ *Anheuser-Busch Brewing Ass'n v. Houck et al.* (1894), 27 S. W. R. 692.

² The Texas court said: "The next question we will consider is whether or not the agreement between Houck & Dieter and the other dealers in beer at El Paso was void, against public policy, as being in restraint of trade. In construing the instrument with this question in view, we find it supplemented by certain uncontradicted evidence, viz., that Houck & Dieter, Schloss and Howley were at that time the only wholesale beer dealers in the city and market of El Paso, the first handling the Anheuser-Busch and the Lemp beer, the second handling the Pabst beer, and the other the Winkelmeyer beer; and these three dealers represented all the keg or bulk beer consumed or sold in that market. If the three parties who entered into this contract had not already been engaged in business as dealers in beer, but, as

individuals, contemplated engaging in the business, had formed a partnership to deal in such beer, and combined their resources to that end, a different case would probably have been presented. The agreement before us (and we may here state that there is no claim by any one that it was not entered into understandingly, or that any terms were introduced into it by mistake or inadvertence, or that for some reason it does not truly state the agreement, so as to raise an issue of fact to be determined in connection with the writing that would defeat it) had for its scope the market of El Paso and its tributaries. It was between the only persons who were then competitors in the supplying of bulk or keg beer to retailers and consumers at that place. It bound each to deliver to the combination all beer handled by him, except bottled beer, the right to assume which was contracted for also in case the combination saw fit to take it; thus, so far as keg or bulk beer was concerned, precluding each from continuing to compete with the

§ 592. Combination of cotton-seed oil mills.¹—A contract between five cotton-seed oil mills fixing prices of cotton-seed and naming the markets wherein each mill was to buy, and

others. It provided for a manager—one of their number—to whom was given the general control and management of the business of the company, subject only to the control of an 'executive board,' thus conferring on the manager and a majority of the board the fixing of prices, and depriving each individual party of his freedom of action in this direction. As a rule, contracts in general restraint of trade are against public policy. This rule has exceptions which it is not necessary now to mention. Contracts in partial restraint of trade are not contrary to public policy if the restriction is reasonable as to time and place, and reasonable also in its effects on the public. We think there can be no doubt that the rule that is to be derived from all the authorities condemns, as being against public policy, an agreement between two or more dealers, in an article of prime necessity or in general use among the people, whereby they agree to jointly control the supply of such article, to cease competition between themselves in respect to it, and to regulate the price thereof in a given community or market. *Salt Co. v. Guthrie* (1880), 35 Ohio St. 666; *Craft v. McConoughy*, 79 Ill. 346; *Hofmann v. Brooks*, 23 Am. Law Reg. 648 (a tobacco case); *Texas Standard Oil Co. v. Adoue* (1892), 83 Tex. 650, 19 S. W. R. 274; *Queen Ins. Co. v. State* (1893), 86 Tex. 650, 24 S. W. R. 397; *Central Shade Roller Co. v. Cushman* (1887), 143 Mass. 353, 9 N. E. R. 629. There may be a question as to whether beer is an article of necessity, but it admits of no question that it is an article of usual and general consumption and of daily use among the people. This is matter of common knowledge. The tendency, and we may say the natural effect,

of this agreement between dealers who were then in control of the keg or bulk beer supply at El Paso, was to suppress competition in the supplying of beer, and to deprive the people of that community of such articles except on such terms as their joint manager or board saw fit to prescribe. The agreement did not in terms fix the price of beer, but it provided for it independently of the individual discretion of the several parties, which, it seems to us, is in effect the same. The effect on the public of an agreement which is against public policy is not essential; the tendency is enough to bring it within the condemnation of the courts. It seems that each of the dealers might have continued to sell bottled beer, but only in a restricted way; for the agreement gave the combination the right, if it chose, to take to itself from each party all bottled beer that there might be a market for. The tendency of the agreement seems, therefore, to have been towards restraint of the trade in bottled beer as well. Is beer one of those articles of consumption, though one in frequent use among the people, the sale of which is not permitted by public policy to be limited by a contract in restraint of trade? We have concluded that it is not. The policy of the laws of the state is not towards the unrestricted or general sale of such article. The liquor traffic has always been kept in restraint by statutes imposing onerous conditions and regulations in reference to its pursuit, clearly evidencing a policy of not allowing every one to engage in the business at will."

¹ *Texas Standard Oil Co et al. v. Adoue et al.* (1892), 83 Tex. 650, 19 S. W. R. 274.

guarantying certain profits to each mill, is illegal and void upon the following grounds:

That the prices paid for cotton-seed by the parties to the agreement were arbitrarily fixed without reference to the market, and were changed only by mutual agreement.

That the selling prices of the products of the mills were arbitrarily fixed, and each party to the agreement was expressly prohibited from selling its products at less than the minimum price so fixed.

Such provisions are contrary to public policy and void. The court, however, says: "If the object of the contract had been merely to provide in good faith a uniformity of prices among the parties thereto, to avoid unhealthy fluctuations in the market, or if the contract had contemplated a joint and mutual association between the parties for their common benefit in the nature of a partnership, and had simply fixed the prices at what they considered the business would bear, instead of a combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which the courts could pronounce as pernicious and forbidden by law. There is no pretense, however, that any partnership was contemplated in this instance; and if there had been, the entire absence of any community of interest in the profits, losses, or capital employed, would have effectually repelled the assumption.

"Each party retained, after the contract as before that time, the control of his capital and the operation of his own mills, and did not throw his capital or manufacturing concerns into a common stock. He continued to operate with his own separate means, but surrendered his right of competition and of supplying his mills with raw material at the best prices he might otherwise have obtained in the markets of the state, and consented to submit to rates artificially established. But the contract — rather, I should say, the combination — did not stop at establishing prices merely. It extends far beyond this, and imperatively prohibits one of the parties in particular from 'purchasing, handling, or shipping, directly or indirectly, any cotton-seed' at many of the most important markets in the state, and binds it to deliver the entire products, 'make or

yield' from cotton-seed, of its mills to the other party to the contract, in consideration of certain net profits guarantied to it. We do not say that there would have been anything wrong in this last stipulation had it stood alone as an entire contract of purchase and sale of the products of the mills represented by Heidenheimer. But it does not stand alone and evidence merely an intention upon the part of the owners of 'the four mills' to obtain in good faith the best prices for their own oils, without aiding or assisting the other party in any unlawful scheme or conspiracy. It forms a part of the general plan, and was plainly, as the contract expresses, superinduced by the other provisions, or 'covenants,' of the agreement, inserted mainly for the benefit of the Howard Oil Company, and is, therefore, inextricably interwoven in these 'covenants.'"

Continuing, the court said: "It thus appears that the above artificial regulations of the value or prices of these staple articles of trade, as well as the arbitrary restrictions imposed by the contract upon the right to deal in them in the usual or customary course of legitimate business, were intended to apply to and control, as far as the contracting parties were able to do so, the market in reference to these staples, and the agreement embraces within its operation the chief cities or commercial centers in the state, as well as the cotton-producing regions thereof, as we may judicially know."¹ "There seems to us to be scarcely anything lacking to characterize the combination between the parties in this case, as evidenced by the language and purpose of their agreement, as a complete monopoly, except the proof that they were the only parties who were engaged at the specified localities in the manufactures referred to in the contract at the time it was made. It is not improbable that every cotton-oil mill in the state was represented in this combination or was intended to be brought into it eventually; but as this is not alleged in the petition, we cannot presume it. We must admit some limit, even to judicial knowledge. But to render the contract void it is not necessary that it should create a pure monopoly. It would seem that the agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices inde-

¹Citing *Gulf, C. & S. F. Ry. Co. v. State* (1888), 72 Tex. 404; 1 Whart. Ev., secs. 329, 339.

pendent of the law of demand and supply, and to such an extent as to injuriously affect the interest of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles of staples which are the subject of the restrictions imposed by the contract. Likewise, the agreement may be, in some instances, void, because of unreasonable or oppressive restrictions imposed upon even one of the parties to it. According to the authorities, the extent of the restraint, though sometimes difficult to measure, determines the character of the agreement, whether legal or not."

§ 593. Combination of bluestone producers.¹—An agreement whereby some fourteen producers of bluestone formed an association, and contracted with one company as sales agent for the purpose of controlling prices, is illegal.²

¹Cummings v. Union Bluestone Ass'n et al. (1897), 44 N. Y. Supp. 787.

²"On February 21, 1887, the Union Bluestone Company, as the party of the first part, entered into a written agreement with the plaintiff, the firm of the defendants Sweeney, and thirteen other parties of the second part, for the purpose of controlling the bluestone trade in the city of New York, and increasing the price of bluestone over the rates then prevailing in the market. By the first article of the contract the Union Bluestone Company, as sales agent, undertook to make sales, as far as practicable, for the parties of the second part, of all the manufactured and unmanufactured marketable bluestone which the market would take, for six years from the date of the agreement, at such rate of tariff of prices as should be fixed by a body known as the Bluestone Association. This body was composed of the parties of the second part themselves, who were the principal wholesale dealers in bluestone along the Hudson river. The Union Bluestone Company agreed to apportion such sales between the members of the

association in certain specified proportions, based on aggregate sales amounting to the sum of \$1,905,000; and the proportion or quota representing the plaintiff's interest, or the quantity of bluestone to be sold in his behalf, was stated at \$90,000. This amount was to be increased or diminished according to the total amount of sales. The bluestone dealers covenanted, in the second article of the contract, to furnish the required stone in the proportions indicated; and by the third article they agreed not to sell or deliver, either directly or indirectly, any stone to any person or corporation, except such as should be sold through the Union Bluestone Company. There were many other provisions, and among them a declaration to the effect that any violation of the contract should subject the offending party to an action at law for damages, or a suit in equity to enforce the agreement."

The court further said: "It seems to me quite clear that this agreement between the wholesale dealers in bluestone, who then controlled ninety to ninety-five per cent. of the

§ 594. **Combination of druggists.**¹—A large number of wholesale druggists and manufacturers of proprietary medicines formed a combination called the Druggists' Association for Mutual Benefit and Protection. In holding certain articles of the association valid and certain articles invalid, the court said: "Unquestionably a part of its aim is to enable those within its scope to obtain prices which shall yield fair profits, and in so doing it acts under rules understood by the associates as well as those expressed. A large part of its line of action, as evidenced by its formal articles of agreement, is unquestionably lawful, as is also a great part of the individual action of the firms entering into the combined association. As an association, it is lawful for the association and the manufacturers to provide means for obtaining information as to the acts of firms violating any proper agreement in regard to the sale of proprietary drugs by any of the associates or the customers of such associates. It is also lawful for the manufacturers individually to agree with their customers that those customers shall sell the particular goods manufactured by the vendor for a certain price, so far, at least, as not to render the manufacturer liable to third parties for doing an unlawful act, however much doubt there may be as to such manufacturers being able to enforce an executory agreement of this kind by proper legal proceeding. It is lawful, also, for each manufact-

manufactured stock sold in the state, was a contract inimical to trade and commerce, under the authority of *People v. Sheldon* (1893), 139 N. Y. 251, 34 N. E. R. 785, and the cases therein cited. It is true that the combination which was the subject of consideration in that case had for its object the prevention of competition between dealers in coal, which may be regarded as an article of necessity, in the ordinary sense, while there is no such general need or demand for bluestone as to bring it within that category. Nevertheless, a production the sales of which within this state in a single year amount to \$1,500,000 is sufficiently useful and important to the community to bring it within the opera-

tion of that rule of law which invalidates agreements to prevent competition in trade. See also *People v. Milk Exchange* (1895), 145 N. Y. 267, 39 N. E. R. 1062. It was insisted by the counsel for the plaintiff that he was entitled to go to the jury upon the question of the validity of the contract, inasmuch as an agreement to increase the price might be either lawful or unlawful, according to the circumstances; but his request in this regard was properly denied, inasmuch as there was no dispute in regard to the terms of the contract, or what had been done under it."

¹ *John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n et al.* (1896), 50 N. Y. Supp. 1064.

urer to refuse to sell to any customer, for any reason, however capricious, any goods manufactured by him. But it is in restraint of trade and unlawful for such manufacturer to become a party to a combination which shall prevent any of his customers from obtaining other goods of other manufacturers because those customers violate the agreement with him in respect to a cutting of prices, and to make such violation a cause of a general exclusion of such customers from the power to purchase any kind of proprietary medicines from any of the other members of the association. It is not lawful to form a combination which shall make general the enforcement of prices fixed by the manufacturer, effective beyond the reach of competition, by the exclusion of such customers from a general power of purchase of other goods."

§ 595. **Combination of retail coal dealers.**¹— All the retail coal dealers in the city of Lockport, with the exception of one, entered into an agreement providing for the organization of the Lockport Coal Exchange. The object of the exchange was generally stated to be as follows: "To foster trade and commerce in coal, wood and all the products appertaining to the same; to protect and secure freedom from unjust and unlawful exactions; to diffuse accurate and reliable information as to the retail coal trade, and of the responsibility and standing of customers, and other matters, among its members, for their mutual protection and benefit; to settle differences between its members; to produce uniformity and certainty in the customs and usages of such trade; to promote a more enlarged and friendly intercourse between merchants and dealers in coal and wood; and to provide, establish and maintain such rules and regulations as may be proper and necessary for the mutual co-operation, interest and protection of the retail dealers in coal and wood in the city of Lockport, and in furthering the coal trade interests generally. It shall be the duty of all members to strictly obey all the provisions of the constitution, by-laws and resolutions of the exchange, and permit to the secretary the free exercise of the duties imposed upon him in enforcing them." By the terms of the agreement the price of coal at retail was to be fixed and kept uniform as far as practicable, and it re-

¹ People v. Sheldon et al. (1893), 139 N. Y. 251, 34 N. E. R. 785.

quired a five-sixths vote of the members of the exchange to advance or reduce the price of coal.¹

A careful reading of the agreement fails to disclose any articles or provisions of a very pernicious nature. The object of the association was to advance the interests of the members by maintaining the prices of coal at a reasonably profitable figure. Certain members of the association were indicted, and it was charged that the agreement constituted an unlawful conspiracy to raise the price of coal and to destroy free competition, and to compel consumers of coal to pay the prices fixed by the exchange.

In holding the agreement illegal the court of appeals referred to the section of the Penal Code of New York which made it a misdemeanor for two or more persons to conspire to commit any act injurious to the public health, to public morals, or to trade or commerce. The court expressly noted that it was not shown at the trial that the prices of coal fixed by the exchange were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. It was held, however, that the agreement was illegal under the section of the Penal Code above referred to. In this connection the court said: "If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be

¹ In this connection the agreement provided that: "No price shall be made at any time which amounts to more than a fair and reasonable advance over wholesale rates, or that is higher than the current prices of the exchanges at Rochester or Buffalo, when figured upon corresponding freight tariff; but at no time shall the price of coal at retail exceed \$1 above the costs of the same at wholesale, except by the unanimous vote of all the members of the exchange. All votes upon the price of coal shall be *viva voce*. The sale of coal shall be through the nominal channels of the trade. Soliciting shall be discouraged, and no club

orders of associated buyers, to reduce prices, shall be considered or accepted. No member shall employ any person temporarily to solicit orders either on salary or on commission, and no signs indicating 'orders taken for coal' shall be displayed at groceries or other 'outside places,' and no habitual orders for second parties shall be received or filled when sent in by such agencies, whether on commission or other form of reciprocity, or only as a matter of friendship. Except that each member may have one place for taking orders, in addition to his regular yard office."

done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers."

Continuing, the court said: "The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers and laborers are alike benefited by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public, or to the community in Lockport. The question is, Was the agreement one in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law affixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the 'exchange' was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required

to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that 'he is not entitled to the privileges of membership in the exchange.' No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange."

Concerning the offense of conspiracy the court said: "The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interest both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement were to prevent competition in the price of coal between the retail dealers, it was illegal and justified the conviction of the defendants."

§ 596. **Combination of five coal companies.**¹—Five coal companies, incorporated under the laws of Pennsylvania, entered into an agreement dividing among them the coal from two particular districts. The agreement was entered into in the state of New York. A committee of three was appointed to take charge of and control the business of the companies and decide all questions by vote. A sales agent in the state of New York was appointed. Provision was made for the mining and delivery of coal, and for its sale through the agent, subject to the important restriction that each party to the agreement should, at its own expense, deliver its proportion of the different kinds of coal in the different markets at such times and to such parties as the committee should from time to time direct. The committee was authorized to adjust the prices of coal in the different markets and the rates of freight, and to enter into contracts to promote the interests of the parties. While the parties were permitted to sell coal themselves, it was only to the extent of their fixed proportion, and at the prices adjusted by the committee. It was also provided that the sales agent in New York state should direct a suspension of shipment or deliveries of coal by any party beyond such party's proportion. Detailed reports of the business were to be made by the companies to the general sales agent, and each party bound itself not to cause or permit any coal to be shipped or sold otherwise than as agreed upon.

The validity of this combination was challenged in an action upon a draft for a balance found to be due against one of the parties to the agreement.² The combination was held illegal.

¹ *Morris Run Coal Co. v. Barclay Coal Co.* (1871), 68 Pa. St. 173.

² "The referee found that the statute of New York is, 'if two or more persons shall conspire,' first, 'to commit any offense;' second, 'to commit any act injurious to the public health, to public morals, or to trade or commerce, they shall be deemed guilty of a misdemeanor.' The referee found, as his conclusion upon the whole case, that the contract was void by the statute, and void at common law, as against public policy. The restraint of the contract upon

trade and its injury to the public is thus clearly set forth by the referee: These corporations (he says) represented almost the entire body of bituminous coal in the northern part of the state. By combination between themselves they had the power to control the entire market in that district. And they did control it by a contract not to ship and sell coal otherwise than as therein provided. And in order to destroy competition they provided for an arrangement with dealers and shippers of anthracite coal. They were

The court said: "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit: the combination resorted to by these five companies. Singly, each might have suspended deliveries and sales of coal to suit its own interests and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate and prices must rise. Or if the supply goes forward the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The in-

thereby prohibited from selling under prices to be fixed by a committee representing each company. And they were obliged to suspend shipments upon notice from an agent that their allotted share of the market had been forwarded or sold. Instead of regulating the business by natural laws of trade, to wit, those of demand and supply, these companies entered into a league, by which they could limit the supply below the demand in order to enhance the price. Or if the supply was greater than the demand, they could nevertheless compel the payment of the price arbitrarily fixed by the joint committee. The restraint

on the trade in bituminous coal was by this contract as wide and extensive as the market of the article. It already embraced the state of New York, and was intended and no doubt did affect the market in the western states. It is expressly stipulated that the parties to this contract shall not be considered as partners. The agreement was not entered into for the purpose of aggregating the capital of the several companies, nor for greater facilities for the transaction of their business, nor for the protection of themselves by a reasonable restraint, as to a limited time and space, upon others who might interfere with their business."

fluence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of community and leaves few of its members untouched by its withering blight. Such a combination is more than a contract — it is an offense.”¹

§ 597. **Combination of milk dealers.**² — A large number of milk dealers and parties engaged in the creamery and milk business in the state of New York organized a corporation called the Milk Exchange, the object of which was to fix the price at which milk should be purchased by the stockholders of the company, who were the dealers in question.³

¹ Upon another point in the case the court said: “A second question is, whether the bill drawn in this case by the general sales agent on the Barclay Coal Company, in favor of the Morris Run Coal Company, to equalize prices upon a settlement under the contract, is such an independent cause of action as will support the suit. When a bill, note or bond is but an instrument to execute an illegal contract, it is tainted by the illegality and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by mere indirection. This is the principle mentioned in the cases of *Steers v. Lashley*, 6 Term R. 61; *Swan v. Scott*, 11 S. & R. 155; *Stanton v. Allen*, 5 Denio, 434; *Fisher v. Bridges*, 3 E. & B. 642; *Lestapies v. Ingraham*, 5 Barr, 71. In the last case, Gibson, C. J., says: ‘The solemnity of the security would not preclude an inquiry into the consideration of it had it been illegal;’ and in *Swan v. Scott*, Duncan, J., said of a bond, ‘there the illegal consideration is the sole basis of the bond, and there can be no recovery.’ In the present case the bill itself refers directly to the equalization account, and was given in immediate execution of the contract. This being the case, it is distinguish-

able from *Fackney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannay*, 3 Term R. 418; *Lestapies v. Ingraham*, *supra*; *Thomas v. Brady*, 10 Barr, 164, cases where the action was not upon the illegal contract, or upon an instrument in execution of it, but was founded upon a new consideration. The distinction is well stated by Judge Washington, in *Toler v. Armstrong*, 4 Wash. C. C. R. 297, affirmed in the supreme court of the United States (11 Wheat. 258). The present case is free from difficulty, the money represented by the bill arising directly upon the contract to be paid by one party to another party to the contract in execution of its terms. The bill itself is therefore tainted by the illegality, and no recovery can be had upon it.”

² *People v. Milk Exchange* (1895), 145 N. Y. 267, 39 N. E. R. 1062.

³ The purpose of the incorporation was stated by the court of appeals as follows: “The defendant was organized on the 21st day of October, 1882, for the purpose, as stated in its certificate of incorporation, ‘of buying and selling of milk at wholesale and retail, the purchase of dairies of milk when deemed advisable, and the sale of the same to milk dealers.’ The complaint charges that the defendant was not engaged in this business. Upon the trial, at the close

It was apparent from the evidence that the exchange was the instrument of the retail dealers and used by them for the purpose of regulating the price of milk. The combination was held unlawful as being in restraint of trade and contrary to public policy; the court saying: "It appears to us that a case is presented in which the jury might have found that the combination alluded to was inimical to trade and commerce, and therefore unlawful. It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article of food, such reduction was not against public

of the evidence, it was conceded by both counsel for the plaintiff and for the defendant that the question whether the defendant had been engaged in buying or selling milk, under the evidence, was a question of law for the court, and not for the jury. We so understand the evidence. There is no conflict, and we have but to ascertain the meaning and intention of the witnesses. The plaintiff's chief witness was Woodhull, the secretary and treasurer of the defendant. In his testimony he makes use of the expression that the exchange 'has bought and sold milk;' but he then proceeds to state that he is familiar with the operations of the Milk Exchange in buying milk of the farmers and selling it to dealers, and then states the manner in which the business was conducted. He says: 'It is this: A farmer brings his dairy into the exchange to be sold. I go out and find him a dealer who can use the milk, and write the farmer how to mark his milk. I make the collection of the dealer and pay it to the farmer, and we guaranty him the collection.' He further testified that the commission was three per cent.; that the milk was never shipped to the exchange, but was shipped directly to the dealer; that they sold the milk for the farmer at the exchange price, which they guarantied to collect and turn over to the farmer, less

their commissions. Numerous witnesses speak of their arrangement made, or attempted to be made, with the exchange for the sale of milk; and in each case it was directly stated that the exchange did not buy milk; that they merely looked up a dealer who would purchase it at the exchange price, and that they guarantied the collection for three per cent. commission. We think, therefore, that there can be no question as to the meaning of the witness Woodhull as to the expression made use of by him above referred to, for he immediately proceeded to explain how the milk was purchased and sold; and this evidence establishes the fact that the milk was not purchased by the exchange, but that it was sold in the manner described for the commission stated. The transactions, therefore, constituted a commission business, and were not, strictly speaking, the 'buying and selling of milk at wholesale and retail.' Whether the engaging in a commission business, such as we have described, is authorized by the defendant's charter we do not deem it necessary now to determine. It may be that the commission business is so closely allied to that of buying and selling as to make the former legitimate and permissible under the defendant's certificate of incorporation." *Ford v. Chicago, etc. Ass'n* (1895), 155 Ill. 166, 39 N. E. R. 651.

policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and, at their option, to enhance the price to be paid by the consumers."

§ 598. **Combination of candle-makers.**¹—An unincorporated association was organized called "The Candle Manufacturers' Association," which included the manufacturers of ninety-five per cent. of a certain variety of candles in a certain portion of the United States. Its object was to increase the price and decrease the manufacture of candles in the territory covered by the agreement, and is found, as a fact, to have had that effect during the whole existence of the association. The members composing the association were required to pay into its treasury two and one-half cents per pound on every pound of candles disposed of on their own account within the territory. But neither was bound to operate his factory; and whether he did, or did not, he received at stated times his proportion of the profits of the pool, which was based upon the business that had been done by him in previous years, thus making it to the interest of each member to operate his factory when the price of candles was high, and to remain idle when the price was low.

An Ohio corporation became a member of the association, but shortly withdrew, and brought suit against the members composing the committee for a certain share of the profits claimed to be due.

The combination was held to be contrary to public policy, and that no recovery could be had; the court saying: "No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represent the association. And a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defense on which they might have relied, had the objects of

¹ *Emery et al. v. Ohio Candle Co.* (1890), 47 Ohio St. 320, 24 N. E. R. 660.

the association been perfectly legitimate. But should a court be called on to consider any defense as long as the claim itself is based upon an agreement to which it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, nor under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the ill-gotten gains."

§ 599. **Combination among buyers of sheep.**¹— Certain brokers and dealers in sheep and lambs organized an association for the avowed purpose of guarding and protecting their business interests from loss by unreasonable competition; by the terms of the agreement they were to pool their commissions except such commissions as were to be paid to a certain Butchers' Association, and an agreement was entered whereby the association of brokers and dealers in shipping were to sell only to the butchers who were members of the Butchers' Association, and the butchers on their side were to buy only of the brokers belonging to the Brokers' Association.

The combinations and agreements were held illegal on the ground that their purpose was to control the markets, fix prices and destroy competition. "The real purpose and intent of the agreement was to suppress competition in an article of food, and as such agreements tend to enhance the price, they are regarded as detrimental to the public interest and forbidden by public policy. That such agreements are illegal and void has been settled by the decisions of the courts from the earliest times. These authorities are to be found in the learned opinion below, and upon the briefs of counsel in this court, but I do not consider it necessary to refer to them further, or to discuss the question at length, for the reason that at this very term of the court the whole question has been examined, elaborately discussed and decided in another case.² Courts will not aid parties seeking to enforce such an agreement,³ irrespective of the question whether in fact it produced the evil results to

¹ Judd v. Harrington (1893), 139 N. Y. 105, 34 N. E. R. 790.

² People v. Sheldon (1893), 66 Hun, 590.

³ Leonard v. Poole (1889), 114 N. Y. 371, 21 N. E. R. 707.

which it tended or was harmless. It is said that the purpose was to facilitate the transaction of business and save useless expense. It is quite likely that the agreement did enable the parties to transact their business with less labor and expense, and that may be said of nearly all combinations; but that circumstance cannot save them from condemnation when they tend to prejudice the public. The illegal character of the agreement appeared upon its face, and was a necessary legal conclusion from its provisions.”¹

§ 600. **Combination of salt producers.**²—Some thirty or more salt producers formed an unincorporated association for the purpose of controlling the manufacture and sale of salt in certain districts. Among the articles of the association was the following: “It shall be the duty of the directors to regulate the price and grades of salt, and settle all disputes and questions in regard to the same; also to employ an agent or agents, who shall be governed by them in all matters pertaining to the business of the company.” . . . “Each member of the association binds himself to sell salt only at retail, and then only to actual consumers at the place of manufacture, and at such prices as may be fixed by the directors from time to time.” The agreement was held void as against public policy, as tending to establish a monopoly and destroying competition in trade.

“Public policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public. We think the contract before us should not be enforced. By it all the salt manufacturers (with one or two exceptions) in a large salt-producing territory, and whose aggregate annual produce is about one hundred and forty thousand barrels, have combined for the expressed purpose of regulating the ‘price and grade of salt.’ A board of directors is chosen. All salt made or owned by the members, as soon as packed into barrels, is placed under the control of the directors. ‘The manner and time of receiving and distributing salt shall be under the control of the di-

¹ From opinion of court of appeals by O’Brien, J., in *Judd v. Harrington*, *supra*.
² *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666.

rectory.' 'Each member of the association binds himself to sell salt only at retail, and then only to actual consumers at the place of manufacture, and at such prices as may be fixed by the directors from time to time.' The directors make monthly reports of sales, and pay over the proceeds to the members, in proportion to the amount of salt received from each. The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public. Nor is this agreement within the principle which permits a person to bind himself not to engage in trade at a particular place. Here the restraint was general. A member of this association, under this agreement, could not engage in the traffic at any place during the life of the association, except only to retail to actual consumers at the place of manufacture, and then only from salt in bulk, and at the price named by the company. It is also claimed on behalf of the plaintiff that this agreement does not affect the right of the members to continue the industry in which they are engaged without restraint; that the company cannot control or limit the amount of salt to be manufactured, and therefore the contract does not injuriously affect the interests of labor. We think that the provision that 'the manner and time of receiving and distributing salt shall be under the control of the directory' confers upon the company ample power to embarrass the freedom of the members as to the quantity of salt which they might wish to manufacture. There is no agreement that the company will receive all the salt manufactured, and at the time when it may be ready for sale."¹

§ 601. Combination of local grocerymen.²—Certain local grocerymen in a small town in Iowa entered into an agreement whereby they pledged themselves to buy no more butter, and to take no more butter in trade except for their family use.

¹From opinion of court by McIlvaine, J. al. (1891), 83 Iowa, 156, 48 N. W. R. 1074.

²D. & E. Chapin v. Brown Bros. et

They abandoned that portion of their business in favor of a particular firm, this firm agreeing to open rooms and appoint an agent for the buying of butter, and to have exclusive control of the same. It did not appear from the agreement that any consideration passed to the grocerymen who abandoned the business of buying butter, and the agreement was held void on the ground that there was no consideration for such contract, and also because it was against public policy as tending to monopolize the butter trade in the locality mentioned and destroy competition.

"The agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced."¹

§ 602. Combination of carbon manufacturers.²—Several manufacturers of carbon entered into an agreement whereby a certain party was made trustee for the management and control of the business of manufacturing and selling carbons. "The scheme of the parties to the combination was to vest in a common trustee the management and control of the business of manufacturing and selling carbons for electric lighting therefore carried on separately by the companies forming the combination. To this end the several companies were to lease to the trustee their respective factories and to operate them under the direction of the trustee, who was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, purchase all materials and supplies, collect the bills and pay out of the common fund the cost of production, and divide the net proceeds and profits of the business between the several parties to the combination in a ratio fixed by the contracts of the respective companies with the trustee."

¹ From opinion of the court by Millan (1890), 119 N. Y. 46, 23 N. E. R. Rothrock, J. 530; affirming 6 N. Y. Supp. 433.

² Pittsburgh Carbon Co. (Ltd.) v. Mc-

A receiver was appointed for the property and assets of the trusteeship, and in the administration of the estate the receiver sought to enforce a certain claim for goods sold and delivered, and it was decided that while the agreement constituting the trusteeship might be illegal and void, the receiver, as the representative of innocent creditors of the combination, could enforce the claim.¹

§ 603. Combination of lumber manufacturers.²—A combination among manufacturers of lumber in a certain district of California was effected in the following manner: One of the companies owning certain saw-mills leased all the mills that it could lease, and where leases could not be made it entered into contracts with parties owning mills whereby they agreed to make a delivery to the corporation first named of a certain

¹The court in its opinion said: "It is claimed that no action could have been maintained by the trustee representing the trust combination against the Brush Electric Light Company to recover the purchase price of the carbons, for the reason that the illegality of the combination would have constituted a good defense. Assuming this predicate, it is then asserted that the receiver stands in the same position, and his title is subject to the same infirmity, as that of the combination which he represents. Without considering the assumption upon which the proposition is based, it is a sufficient answer to the proposition asserted that the receiver unites in himself, not only the right of the trust combination, but the right of creditors, and that he may assert a claim, as representing creditors, which he might be unable to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former may be asserted against the latter. But there is a well-recognized exception, which permits a re-

ceiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights. *Gillett v. Moody* (1850), 3 N. Y. 479; *Porter v. Williams* (1853), 9 N. Y. 142; *Curtis v. Leavitt* (1857), 15 N. Y. 9, 108. Assuming that the trustee could not have recovered of the Brush Electric Light Company, for the reasons suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction which should deny to innocent creditors of the combination, or to the receiver who represents them, the right to have the debt collected and applied in satisfaction of their claim. The just rule of the common law, that the courts will not lend their aid to enforce illegal transactions at the instance of a party to the illegality, would be misapplied if permitted to be used to prevent the recovery and application of the fruits of the transaction for the payment of honest creditors. We think the judgment is right, and it should therefore be affirmed."

²*Santa Clara Valley Mill & Lumber Co. v. Hayes et al.*, 76 Cal. 387, 18 Pac. R. 391.

amount of lumber at a certain price, and also agreed not to manufacture and sell any lumber in certain specified counties, during the period covered by the agreement, to any other party under penalty of so many dollars per thousand feet so sold, which penalty was payable to the corporation first named. The object and purpose was to form a combination in order that the price of lumber might be increased and the amount manufactured limited.

The combination was held illegal, and the agreement was held void as against public policy, the court saying: "Here it (plaintiff) entered into a contract with the object and view to suppress the supply and enhance the price of lumber in four counties of the state. The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract."

The court went on to say that the corporation obtaining the leases and contracts "had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places as it saw fit; but when as a condition of purchase it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dictated by the experience and wisdom of ages as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade. With the results naturally flowing from the laws of demand and supply, the courts have nothing to do; but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto."¹

¹ As regards the divisibility of the contract the court said: "It is claimed by appellant that the contract is divisible, and the first part can stand though the latter be illegal. If the whole vice of the contract was embodied in the promise of the defendants not to sell lumber to other persons, the illegality would lie in the promise alone, and it might be contended with great force that this promise was divisible from the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration. The very essence and mainspring of the agreement—the illegal object—'was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured,' etc

§ 604. Combination of wire cloth manufacturers.¹— Three corporations and two copartnerships, all engaged in the manufacture and sale of wire cloth, entered into a combination for the avowed object of regulating the price of their product; they formed an association and agreed to abide by certain schedules of prices, and engaged that they “will sell no cloth at less than the prices set forth;” and to insure the observance of the agreement subjected themselves to a heavy penalty for its violation.

In holding the combination illegal the court said: “The declared purpose of the agreement is to enable the association, as between its members, to ‘regulate the price’ of the commodity in which they deal, and this result is accomplished by empowering the association to fix a price, and by binding its members, under a penalty, not to sell below the sum so prescribed. Since all the members are to sell for the same price, of course competition between them is impossible; and, having power to fix the price, they will be impelled by the irresistible operation of self-interest to raise that price to the highest attainable figure. Here, then, is an agreement of which the inevitable effect is, in conformity with its proclaimed design, to restrict competition in trade, and to arbitrarily enhance the price of a commodity of commerce. That such a contract is repugnant to public policy, and so unlawful, is a settled principle in the jurisprudence of this country. The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition.”²

This being the inducement to the agreement, and the sole object in view, it cannot be separated and leave any subject-matter capable of enforcement, as was done in *Granger v. Empire Co.* (1881), 59 Cal. 678; *Treadwell v. Davis* (1868), 34 Cal. 601, and *Jackson v. Shawl* (1865), 29 Cal. 267. The case falls within the rule of *Valentine v. Stewart* (1860), 15 Cal. 387; *Prost v. More* (1870), 40 Cal. 347; *More v. Bonnet* (1870), 40 Cal. 251; *Forbes v. McDonald* (1880), 54 Cal. 98; *Arnot v. Coal Co.* (1877), 68 N. Y. 558. The good cannot be separated

from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action.”

¹ *De Witt Wire Cloth Co. v. N. J. Wire Cloth Co.* (1891), 14 N. Y. Supp. 277.

² The general principles announced by the court in the text are sustained by the following cases: *Santa Clara, etc. Co. v. Hayes*, 76 Cal. 387, 18 Pac. R. 391; *City of St. Louis v. Gas Co.*, 70 Mo. 69; *Central Ohio Salt Co. v. Guthrie* (1880), 35 Ohio St. 666; *Rich-*

After reviewing the authorities at some length, the court reached the following conclusion: "Thus by the overwhelming, if not uniform, current of authority, the agreement under criticism is condemned as contrary to public policy, and illegal. Nor is the operation of the rule forbidding contracts restricting competition and enhancing price limited to trade in the necessities of life, but, as appears from the citations above, extends equally and alike to all commodities of commerce. Neither need the agreement or combination, in order to expose it to the denunciation of the law, constitute a complete monopoly, or effect a total suppression of competition; but the language of courts and of writers is that, if the agreement or combination tends to monopoly, or reduce or lessen competition, it is contrary to public policy and unlawful, because operating *pro tanto* an artificial enhancement of price."

§ 605. Combination of tobacco warehousemen.¹ — All the owners of tobacco warehouses in the city of Cincinnati entered into a written agreement the object of which was to promote and protect the trade and harmonize their conflicting interests. They adopted the plan of pooling a portion of the receipts of the business; the owner of each warehouse was to make to the pool trustee on the first day of each month a sworn statement as to the amount of business done, and pay to the pool so much per package; at the end of the year the pooled fund was to be distributed in proportion to the business ordinarily done by each warehouse. The association fixed the rates for drayage, storage, inspection, etc.

ardson v. Buhl (1889), 77 Mich. 632, 43 N. W. R. 1102; State v. Goodwill (1889), 33 W. Va. 179, 10 S. E. R. 285; Anderson v. Jett (1889), 89 Ky. 375, 12 S. W. R. 670; Stewart v. Trans. Co. (1871), 17 Minn. 372; People v. Fisher (1835), 14 Wend. 1; Hooker et al. v. Vandewater (1847), 4 Denio, 349; Marsh v. Russell (1876), 66 N. Y. 288; Hartford, etc. v. N. Y. etc. Ry. Co., 3 Rob. 415; Arnot v. Coal Co. (1877), 68 N. Y. 558; Leonard v. Poole (1889), 114 N. Y. 371, 21 N. E. R. 707; Stanton v. Allen (1848), 5 Den. 434; Clancy v. Manufacturing Co. (1862), 62 Barb. 395; Craft v. McConoughy (1875), 79

Ill. 346; India Bagging Ass'n v. Kock, 14 La. Ann. 164; Hilton v. Eckersley (1855), 6 El. & Bl. 47; People v. Chicago Gas Trust Co. (1889), 130 Ill. 268, 22 N. E. R. 798; People v. American Sugar Refining Co., 7 Ry. & Corp. L. J. 83; Watson v. Nav. Co. (1877), 52 How. Pr. 348; Murray v. Vanderbilt, 39 Barb. 140; Wright v. Ryder (1868), 36 Cal. 342; Morgan v. Donovan (1877), 58 Ala. 242; Nester v. Cont. Brewing Co., 161 Pa. St. 480; Pittsburg Carbon Co. v. McMillin (1890), 119 N. Y. 46, 23 N. E. R. 530.

¹ Hoffman v. Brooks, 23 Am. Law Reg. 648.

In holding the agreement invalid and the combination illegal, the court said that the cases bearing upon the question seemed to separate into two classes of cases: "In one the question is whether the contracting party has, to a greater extent than fairly required for the protection of his private interests, disabled himself from carrying on his trade or business, and so not only deprived society of a useful member, but created a strong probability of adding to its burdens by reason of idleness or crime. The public in this class of cases is affected only indirectly through the individual contracting. . . . In the other class the question arising upon agreements creating combinations of persons engaged or interested in the same kind of business is whether their object and effect are to directly affect the public 'by preventing competition and enhancing prices,' or 'by exposing it to the evils of monopoly.'" And continuing: "In the first class of cases just named the interests of the public and those of the party are to a great extent the same. Both forbid any restriction of his earning power without an equivalent, and this is the reason why only a partial restriction is permitted, and that only for a valuable consideration. In the second class of cases the immediate interests of the public and those of the contracting parties are in conflict. The former desire lower, the latter higher, prices. Any prevention of competition injures the public in this regard. But when competition becomes so great that those engaged in a business cannot carry it on without loss, the public becomes exposed to the same danger as in the first class. The law therefore applies an analogous rule. Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and so increasing prices. Just the extent to which this may be done courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud. The presumption is always against the validity of such agreements, and certainly, where they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods to which the hope of gain makes human ingenuity so fruitful, to strangle

competition outright and breed monopolies, the law, while it may not punish, will not enforce them.”¹

¹ As to the different provisions of the agreement and their divisibility the court said: “Judged by this rule we think the agreement upon which this action is based must be condemned. Parts of it are perhaps not objectionable, such as those providing against the employment of agents, the payment of bounties, attempts to change consignments, and for notice to each other of advancements to common customers, etc. But by its terms it purports, and by its pleadings is admitted, to embrace all the persons engaged in a business shown by the pleadings to be of very great magnitude in a city admitted to be the largest market for such business in the United States. It is unlimited in duration, and manifestly intended to be perpetual. None can withdraw without unanimous consent, and the guaranty fund is actually contrived to operate as a constantly strengthening chain to hold the association together. It is not averred that the prices fixed are extortionate, but it is enough that they are absolutely removed beyond the operations of every natural cause of fluctuation. Though fixed at first for only a year, there is no telling how they might be fixed in succeeding years when the guaranty fund becomes sufficient of itself to force obedience to the mandates of the managers. In short, either this rule does not apply to persons engaged in this business at all, or this contract violates it. It is hard to imagine how it could go further than it does. Nor is it one of those agreements in which, for the purposes of our judgment here, the good can be separated from the bad. Judgment for plaintiffs would merely place money in the fund which is held as a guaranty for compliance with all and singular the stipulations of the agreement. We are not asked nor have we power to control its application. We are requested to confer a sceptre to be wielded by an absolute monarch.” There is an interesting note to the report of this case in 28 Am. Law Reg., beginning at p. 658.

CHAPTER 16.

TRUSTS.

- § 606. Evolution of the trust form of combination.
- 607. Trust form of combination illegal.
- 608. Trust form obsolete.
- 609. Cases of "trusts."
- 610. Combination of sugar refineries.
- 611. Standard Oil Trust.
- 612. Distillers' and Cattle Feeders' Trust.
- 613. American Cattle Trust.
- 614. American Preservers' Trust.
- 615. Chicago Gas Trust.
- 616. Cotton-seed oil combination.

§ 606. Evolution of the trust form of combination.—All combinations of capital are commonly referred to as "trusts;"¹ but this is a confusion of terms which is productive of prejudice. There are combinations of capital which are trusts, and there are combinations which are not trusts; to confound the two is as idle as to call a partnership or a voluntary association a trust simply because it controls a given trade.²

¹ Cook defines "trusts" as follows: "A 'trust' is a combination of many competing concerns under one management, which thereby reduces the cost, regulates the amount of production, and increases the price for which the article is sold. It is either a monopoly or an endeavor to establish a monopoly. Its purpose is to make larger profits by decreasing cost, limiting production, and increasing the price to the consumer. . . . The term 'trust' is popularly applied to all methods of effecting a combination in trade. It is used to designate not only the most recent development and approved method of forming the combination, but also the primitive and crude contracts called 'pools.'" Cook, Trusts, 4. "A

trust," says Mr. Henry Wood, "may be defined as a more or less intimate combination of business corporations or manufacturers for supposed mutual advantage."

² It is a matter of regret that the use and abuse of the term "trust" in connection with the combination of capital has, by association and reflection, brought the very term "trust" into disrepute, and has even attached an ill-flavor to trust companies which are engaged in the regular transaction of trust business. In the popular mind the term "trust" has come to signify some sort of an obnoxious combination, and comparatively few laymen know, or if knowing, pause to consider, that the term "trust"—exactly as the word

The trust form of combination was simply an effort to evade the force of the many decisions against simple combinations. The courts having held in the cases reviewed in the last chapter that neither parties nor corporations could become parties to agreements, pools or associations for the control of prices and products, it was suggested that the same practical result might be accomplished by the organization of constituent corporations, each stockholder of which would deposit his stock with certain trustees, giving them the power to vote same, and thereby control all the constituent corporations, the stockholder receiving, in return for the stock surrendered, trustee certificates. It was argued, with some show of reason, that a man could do as he pleased with his own, and if he saw fit to place his stock in the hands of another with power to vote it he could do so. But, as will be seen, the courts condemned the "trust" as illegal combination under another form and name.

Aside from the legality of the trust as a combination there are many objections to the trust form, which objections, in so far as the combination of corporations is concerned, are based upon certain general principles and propositions governing corporation law generally. In other words, a combination of two or three corporations for entirely legitimate purposes, and which is entirely unobjectionable as a combination, is subject to attack, if the trust form is adopted, upon the ground that each constituent corporation has violated some provision of its charter or some principle of the law of its creation. Corporations being creatures of the law, and deriving their right to exist and all their powers from the law, they are debarred from exercising many of the privileges of an individual. They cannot surrender their franchise nor delegate their duties to others with the same freedom that an individual can abandon his occupation and turn over his business.

§ 607. Trust form of combination illegal.— The trust form of combination proved as unsafe as it was alluring. It seemed comparatively simple for men to deposit their stock with trustees, confer upon the trustees the right to vote the stock and thereby control the several corporations interested in the trust,

implies — covers relations and obligations of the most sacred character, and there is no more interesting branch of the law than the law of trusts.

and receive in return the certificates of the trustee. Furthermore, the law of trusts generally is so well established that the duties and responsibilities of the trustees were well known and seemed easy of enforcement. Furthermore, the whole machinery of the trust form of combination appealed to the lawyer and mystified the layman. It is not surprising, therefore, that it was adopted in a number of important instances; and yet the slightest reflection shows that the trust form of combination is the most hazardous and most vulnerable of all forms, since it not only creates a new body,—namely, the trustee body,—which is subject to assault in the courts of the state wherein the trustee body exists, but this form of combination carefully preserves alive and intact each constituent member of the trust, apparently for the sole purpose of enabling the courts of each state and each locality, wherein the constituent members have their places of residence, to assail these members for participating in an illegal combination, or for violating their charters, or for abandoning or delegating the duties for which they were created, or for any other violation of the rules governing corporation law. So that where four or five corporations of as many different states come together under the trust form of combination, each corporation is subject to attack in the courts of its state, and the trustee body is subject to attack in the courts of the state where that body has its legal existence. With no corresponding advantages whatsoever the trust form of combination is subject to these very serious disadvantages, and, as will be seen in the first of the cases about to be reviewed, the dissolution of the trust was accomplished not by an assault upon the trustee body, but upon one of the constituent corporations.

The general propositions underlying the decisions of the courts which hold that the trust form of combination is illegal are the following:

1. A corporation and its shareholders are practically identical.¹

¹ *People v. North River Sugar Refining Co.* (1890), 5 Ry. & Corp. Law Jour. 56, 54 Hun, 354, 121 N. Y. 582, 24 N. E. R. 834.

“‘A corporation, or a body politic, or a body incorporate is a collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an

2. The participation of all the stockholders of a corporation in the organization of a trust by the depositing of their

individual.' 1 Kyd on Corp. 13. 'It is really an association of persons, and the word "corporation" is but a collective name for the corporators or members. 1 Morawetz on Corp., secs. 1, 227, 474; *People v. Assessors* (1841), 1 Hill, 620. The shareholders, vested with the corporate powers, are the body corporate, corporation or company. *Taylor on Corp.*, sec. 50. Chief Justice Marshall, in *Providence Bank v. Billings* (1830), 4 Pet. 562, said that the great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.'"

"In *People v. Kingston, etc. Turnpike Co.* (1840), 23 Wend. 205, Chief Justice Nelson, in a *quo warranto* proceeding, declared that, 'though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court.' And this is entirely reasonable. For what is the corporation apart from the whole body of the members or stockholders clothed with the statutory franchises? Merely a name. When the whole body of stockholders offend the law of the corporate being, the corporation offends. And who is punished by forfeiture or dissolution because of such offending? Not the mere corporate name, but the persons who have actually offended, and who have thereby forfeited the franchise which they possessed under the corporate name. The directors are but the agents of the corporation to manage its affairs and carry out the purpose and object of its formation. They are only authorized to do such things as are directly or impliedly directed or authorized by the charter. *Abbot v. American Hard*

Rubber Co. (1861), 83 Barb. 578, citing *Ang. & Ames on Corp.*, sec. 280." From opinion of Barrett, J., 54 Hun, 345.

Referring to the abstract idea of a corporation, the court of appeals, in the *North River Sugar Refining Co.* case, said: "The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is, what, in a given case, has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise is usually material; but as between it and the state, the substantial inquiry is only what that collective action and agency has done, what it has in fact accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting reach results and accomplish purposes clearly corporate in their char-

stock is the assent and the participation of the corporation itself.

acter, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in *People v. Turnpike Road Co.* (1840), 23 Wend. 198: 'Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court.'"

The supreme court of Ohio in *State v. Standard Oil Co.* (1892), 49 Ohio St. 137, 30 N. E. R. 279, said:

"The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders, by distinguishing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim *in fictione juris subsistit æquitas* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. Broom's Legal Maxims, 130.

'It is a certain rule,' says Lord Mansfield, C. J., 'that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' *Johnson v. Smith* (1760), 2 Burr. 962. 'They were invented,' says Brinkerhoff, J., in *Wood v. Ferguson* (1857), 7 Ohio St. 288, 'for the advancement of justice, and will be applied for no other purpose.' And it is in this sense that they have been constantly understood and applied in this state. *Hood v. Brown* (1821), 2 Ohio R. 269; *Rossman v. MoFarland* (1859), 9 Ohio St. 381; *Collard's Adm'r v. Donaldson* (1848), 17 Ohio R. 264.

"No reason is perceived why the principles applicable to fictions in general should not apply to the fiction that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented. One author seems to think that it has outlived its usefulness, that it is 'a stumbling-block in the advance of corporation law towards the discrimination of the real rights of actual men and women,' and should be abandoned. *Taylor on Corp.*, § 51. . . . The idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and, to base an argument upon it, where the question is as to whether a certain act was the act of the corporation or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result.

"Now, so long as a proper use is

3. A corporate franchise is granted and held upon condition that it be exercised for the attainment of the object specified, and as a rule it may be forfeited for non-user or misuser.¹

made of the fiction that a corporation is an entity apart from its shareholders, it is harmless and because convenient should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then, in one department of the law, fraud would enjoy an immunity awarded to it in no other."

¹ For instances of non-user and misuser resulting in the forfeiture of charter, see *People v. City Bank of Leadville* (1884), 7 Colo. 226, 3 Pac. R. 214; *People v. Kankakee River Imp. Co.* (1882), 103 Ill. 491; *People v. N. Y. Savings Bank* (1889), 129 Ill. 618, 22 N. E. R. 288; *State v. New Orleans Gas Light & Banking Co.* (1842), 2 Rob. 529; *Chesapeake & Ohio Canal Co. v. B. & O. R. Co.* (1832), 4 Gill & J. 1; *Com. v. Massachusetts Turnpike Co.* (1853), 65 Mass. 171; *Brooklyn Steam Transit Co. v. City of Brooklyn* (1879), 78 N. Y. 524; *People v. Buffalo Stone & Cement Co.*

(1892), 131 N. Y. 140, 29 N. E. R. 947; *Mumma v. Potomac Co.* (1834), 33 U. S. 281; *Taylor v. Holmes* (1882), 14 Fed. R. 498; *Hartford Bridge Co. v. Town of East Hartford* (1844), 16 Conn. 149; *State v. Vincennes University* (1854), 5 Ind. 77; *Washington & B. Turnpike Road v. State* (1862), 19 Md. 239; *People v. Plainfield Ave. Gravel-Road Co.* (1895), 105 Mich. 9, 62 N. W. R. 998; *State v. Council Bluffs & N. Ferry Co.* (1881), 11 Neb. 354, 9 N. W. R. 563; *Slee v. Bloom* (1822), 19 Johns. 456, 10 Am. Dec. 273; *People v. Albany & V. R. Co.* (1862), 24 N. Y. 261, 82 Am. Dec. 295.

The cases involving the forfeiture of franchises of railway companies for failure to complete its line within the prescribed period are quite numerous. See *Ford v. Kansas City & I. S. L. R. Co.* (1893), 52 Mo. App. 439; *Nichol v. N. Y. & E. R. Co.* (1848), 1 Code R. 89; *In re Kings County Elevated Ry. Co.* (1886), 41 Hun, 425; *Bywaters v. Paris & G. N. Ry. Co.* (1889), 73 Tex. 621, 11 S. W. R. 856.

It has been held, however, that mere non-user of corporate franchise is not a sufficient ground for forfeiture of charter. *Vincennes University v. Indiana* (1852), 55 U. S. 268; *Swan Land & Cattle Co. v. Frank* (1889), 39 Fed. R. 456; *Evarts v. Killingworth Mfg. Co.* (1850), 20 Conn. 447; *Rollins v. Clay* (1851), 33 Me. 132; *Proprietors of Baptist Meeting House v. Webb* (1877), 66 Me. 398; *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. Co.* (1832), 4 Gill & J. 1; *Slee v. Bloom* (1822), 19 Johns. 456, 10 Am. Dec. 273; *Attorney-General v. Bank of Niagara* (1825), Hopk. Ch. 354; *Attorney-General v. Superior & St. C. R. R. Co.* (1896), 93 Wis. 604, 67 N. W. R. 1138.

For a general discussion of the dissolution of corporations and the for-

4. The charter of a corporation may be forfeited if the corporation is guilty of acts contrary to either statute or common law.

5. Corporations cannot consolidate their funds or form partnerships unless expressly authorized by grant or necessary implication.¹

6. Corporations cannot abandon or delegate to others the functions and duties for which they were created.²

7. Without statutory provision one corporation cannot acquire and hold stock in another corporation for the purpose of controlling and managing the latter in the interest of either a combination or the former corporation.³

feiture of charters, see Cook on Corp., ch. 38. But it is not every imaginary breach that will forfeit the charter of a corporation. *Commissioners for Female Seminary v. State* (1850), 9 Gill, 379. Failure to list property for taxation and to display sign at its office are not grounds for forfeiting charter. *North & South Rolling Stock Co. v. People* (1893), 147 Ill. 234, 35 N. E. R. 608. For other instances of violations of law and charter which were held insufficient to work a forfeiture, see *King v. C. Ins. Co.* (1841), 26 Wend. 62; *Demarest v. Flack* (1891), 128 N. Y. 205, 28 N. E. R. 645; *State v. Merchants' Ins. & Trust Co.* (1847), 27 Tenn. 235; *Hughes v. N. P. Ry. Co.* (1883), 18 Fed. R. 106.

¹ *Marine Bank v. Ogden* (1862), 29 Ill. 248; *Aurora Bank v. Oliver* (1895), 62 Mo. App. 390; *New York & Sharon Canal Co. et al. v. Fulton Bank* (1831), 7 Wend. 412; *Gunn v. Central R. Co.* (1885), 74 Ga. 509; *Whittenton Mills v. Upton* (1858), 76 Mass. 782, 71 Am. Dec. 681. The sale of the property assets of a corporation does not necessarily in and of itself accomplish the dissolution of the corporation or furnish ground for forfeiting the charter. *Reichwald v. Commercial Hotel Co.* (1883), 106 Ill. 439; *Hill v. Fogg* (1867), 41 Mo. 563; *Kansas City Hotel Co. v. Sauer* (1877), 65 Mo. 279;

Troy & R. R. Co. v. Kerr (1854), 17 Barb. 581; *Bruffet v. Great Western R. Co.* (1861), 25 Ill. 353; *State v. Bank of Maryland* (1834), 6 Gill & J. 205, 26 Am. Dec. 561; *New Jersey Zinc Co. v. New Jersey Franklinite Co.* (1861), 13 N. J. Eq. 322; *Black v. Delaware & R. Canal Co.* (1871), 22 N. J. Eq. 130.

² A mercantile corporation cannot, by an arrangement with other corporations, place its stock in the hands of trustees, with power to manage the affairs of all the companies as one, for the purpose of increasing its profits, thus substituting the trustees as the governing body of the corporation instead of its officers, as such an act is inconsistent with the purposes of its creation. *Gould v. Head* (1889), 38 Fed. R. 886.

³ For decisions to the effect that one corporation cannot subscribe for and hold stock in any corporation, see *Merz Capsule Co. v. U. S. Capsule Co.* (1895), 67 Fed. R. 414; *Denny Hotel Co. v. Schram* (1893), 6 Wash. 134, 32 Pac. R. 1002; *McMillin v. Carson Hill Min. Co.* (1878), 12 Phila. 404; *Commercial Fire Ins. Co. v. Board of Revenue* (1892), 99 Ala. 1, 14 S. R. 490; *Knowles v. Sandercock* (1895), 107 Cal. 629, 40 Pac. R. 1047; *Clark v. Central R. R. & Banking Co.* (1892), 50 Fed. R. 338; *Easun v. Buckeye*

While the foregoing are the fundamental propositions underlying the decisions in the cases about to be reviewed, they are not of such universal validity as to be generally applicable in all controversies involving discussions of the law governing

Brewing Co. (1892), 51 Fed. R. 156. In this case the court said: "The provisions of this contract clearly contemplated that the Buckeye Brewing Company, which, so far as the pleadings before us show, was, at the time of making such contract, not only a solvent corporation, but a prosperous and profitable one, should sell and dispose of its plant and all its assets, and a very large part of the consideration for such sale was to be stock and bonds in an English corporation to be organized to carry on the business of the vendee. The provisions of the contract specified as to the rate of interest such bonds should carry, and the dividends such stock should pay. By implication it is fair to infer that it was contemplated that the Buckeye Brewing Company, as a corporation, should continue for the purpose of collecting the interest on these debenture bonds, the dividends on the stock of the new corporation, and to distribute the same among the shareholders of said Buckeye Brewing Company. It was therefore to continue its business as a corporation, not for the purpose of carrying out the objects for which it was organized, viz., the business of a brewing company, but for the purpose of owning stock in a new corporation, and, to the extent that ownership of such stock involved participating in the management of that corporation, it was to assist in carrying on the business of another corporation. There was no such exigency in the business of this corporation as to make such sale of its property and change in the nature of its corporate business necessary for the protection of its stockholders. Counsel for the plaintiff have cited many cases in which the courts of several of the states, under statutes very similar to those of Ohio, have held that corporations had a right to own and control the stock of other corporations, but in every such case to which our attention has been called such power was conceded to the corporation as incident to its inherent right to protect its shareholders from loss, owing to some peculiar exigency in the affairs of the corporation. An insolvent corporation, contemplating voluntary dissolution by consent of its shareholders, might have a right to dispose of its property, and accept in whole or in part, for the purchase price thereof, stock in another corporation; this stock to be either sold, and the proceeds thereof distributed to the creditors, or to be apportioned in kind to such creditors or stockholders as the terms of dissolution might provide. A receiver appointed to manage the affairs of an insolvent corporation and to close out its business might be authorized to dispose of its assets, and receive in payment therefor stock in the corporation, to be disposed of as the court might order in the distribution of its assets. But in all these cases there must be some stringency or emergency to justify this departure from the ordinary course of the business of the corporation. But in this case no such emergency existed. As before stated, the corporation was doing a flourishing business. Its plant and goodwill and business were considered so desirable that the vendee agreed to pay therefor the large consideration specified in the contract. This sale could undoubtedly have been made

corporations. For instance, the proposition that a corporation and its shareholders are practically identical is of little value save in controversies between the corporation and the state of its creation. The private suitor deals with the corporation as an entity, and not with its constituent units, and in nearly all controversies the identity of the corporation is preserved even though the stock be virtually owned by one person. The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the persons composing it, is something more than a mere fiction, since the corporation is a distinct body created by law with powers, duties and responsibilities entirely distinct from those resting upon any or all of its members. The powers, duties and responsibilities of the corporation being fixed by its charter and the statute governing its creation, the persons composing it are powerless to affect these charters and statutory provisions, but as against the state the act of all the stockholders is frequently treated as the act of the corporation.

for cash and deferred payments. The purchase price might not have been so great upon such a basis, but still would have been adequate. As no emergency existed to compel this sale, and the transaction was purely voluntary on the part of the corporation, there is no reason why it should be permitted to violate the well-settled principles of law by taking stock in a new corporation, and thereby enhancing the consideration which it was to receive. Public policy discourages such transactions." Citing *Franklin Bank v. Commercial Bank* (1881), 36 Ohio St. 350. In this case the supreme court of Ohio said: "Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the

business of manufacturing, and any other corporation could engage in banking by obtaining control of the bank's stock. Nor would this result follow any the less certainly if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is, as to the corporation, a stockholder, and has the right to vote upon the stock." See, also, *Lithgow Mfg. Co. v. Fitch* (1884), 5 Ky. Law Rep. 604; *Franklin Co. v. Lewiston Institute* (1877), 68 Me. 43.

But this general rule regarding the acquisition of stock for purposes of control does not affect the right of a corporation to take stock in satisfaction of a debt, or as security, or under circumstances which render it advisable or necessary for the corporation to take the stock in order to protect itself from loss.

Furthermore, it is well settled that not every case of non-user and not every case of misuser will cause the forfeiture of the charter of a corporation. No general rule can be adduced from the authorities, but each case must be considered in connection with the facts. Many attempts have been made to lay down a general rule as to when non-user works a forfeiture and when it does not; for instance, it has been held that a franchise will not be forfeited for non-user unless it affects matters which are of the essence of the contract between the state and the corporation.¹ Again, it has been said that cases of non-user which do not amount to wilful and repeated violence of the contract between the corporation and the state are not sufficient to forfeit a franchise.² Again, it has been held that non-user for a period as long as twenty years is not conclusive, *per se*, of abandonment.³ Failure to organize under the charter does not necessarily work a forfeiture,⁴ and failure to exercise all of the corporate privileges does not forfeit.⁵ It has been said that a charter will not be forfeited unless there appears a plain abuse or neglect of power, by which the corporation fails to fulfill the object of its creation.⁶

In so far as any general rule may be formulated from the many apparently conflicting decisions, it is to the effect that, where the non-user or misuser is of a character which affects the public, the charter may be forfeited; but where the non-user or misuser is of a character which affects only the corporation and the parties interested in the corporation, the charter is not necessarily subject to forfeiture. As a rule it is quite immaterial to the state and to the public whether the charter of a private manufacturing corporation, for instance, remains in force or not. There is no reason why the state should intervene to forfeit the charter of every manufacturing or industrial or commercial corporation which happens to go out of

¹ Harris v. Mississippi V. & S. L. R. Co. (1875), 51 Miss. 602.

² State v. Société Republicaine De Secours, etc. (1880), 9 Mo. App. 114. See also in this connection, State v. Council Bluffs & N. Ferry Co. (1881), 11 Neb. 354, 9 N. W. R. 563.

³ Raritan Water Power Co. v. Veghte (1869), 21 N. J. Eq. 463.

⁴ State v. Simonton (1878), 78 N. C. 57.

⁵ Wadesboro Cotton Mills Co. v. Burns (1894), 114 N. C. 353, 19 S. E. R. 238.

⁶ State v. Gilmer's College (1877), 32 Ohio St. 487.

business and remain out of business for a long period of time. It is wise, no doubt, to provide by law for the making of annual reports by corporations, and to provide that with the lapse of time and the failure to report the corporation shall be deemed dissolved and the charter surrendered. But in the absence of such provision the fact that a charter is outstanding is, as a rule, immaterial, unless it stands in the way of the granting of other charters, or the non-user of the duties imposed affects in some manner the public.

§ 608. **Trust form obsolete.**—The trust form of combination is seldom resorted to at the present time. Within two years only one very large combination has been perfected under the trust form. It is now generally believed that the safer form is the corporate combination, which will be discussed in the following chapter.

§ 609. **Cases of "trusts."**—The following are the principal American cases involving the validity of the trust form of combination. In reviewing these, and in fact all cases involving the validity of combinations, it is important to recite accurately and in some detail the facts, and to follow the cases, whenever it is practicable, through the several courts, so that the various reasons assigned by the different courts and different judges for the legality or illegality of the combination may be construed in connection with the final result. As will be seen, it frequently happens that a court, in condemning a specific form of combination, at the same time either directly or inferentially approves some other form of combination, and the force of the decision is thereby greatly modified. Again, it frequently happens that while judges agree that a certain combination is illegal, they do not agree as to the reasons why it is illegal, the force of the decision thereby being dissipated.

§ 610. **Combination of sugar refineries.**¹—As this is the leading case on the law of the trust form of combination it will be proper to consider it at some length. The North River Sugar Refining Company was organized as a manufacturing corporation under the law of the state of New York² in the

¹ *People v. North River Sugar Refining Co.* (1889), 5 Ry. & Corp. Law Jour. 56, 54 Hun, 354, 121 N. Y. 586, 24 N. E. R. 834. The opinion of Barrett, J., in the supreme court is given in full as a note in 54 Hun, 355.

² Ch. 40 of laws of 1848.

year 1865, and continued to carry on its business until the close of the year 1887.

In the year 1887 a plan was formed for the organization of what was called the Sugar Refineries Company, to go into effect in October of that year. "Its general object was to bring together the parties and corporations engaged in the manufacture, refining and sale of sugar, and to place their affairs under a board of eleven persons, subject to a further increase to the number of thirteen, having to a large extent the management and control of this business. The company, in this manner provided for, was not, neither was it intended to be, a corporation, but it was in the nature of a partnership or combination designed to include, as far as that should prove practicable, the companies and persons engaged in this business in the United States. Its objects were generally stated in the deed adopted for this purpose to be: (1) To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as consistent with reasonable profit. (2) To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar. (3) To furnish protection against unlawful combinations of labor. (4) To protect against inducements to lower the standard of refined sugars. (5) Generally to promote the interests of the parties hereto in all lawful and suitable ways. And the manner in which they were to be promoted and attained was to bring the several companies and parties into an association under the articles or deed adopted for that purpose. Where the business was carried on by individuals, it was declared that they should become corporations, and, as such, associates under this plan. And while the corporations becoming parties to the agreement were still to maintain their separate organizations, and carry on and conduct their own business, that was to be done under the control and management of the association through the board selected to exercise its authority. That the corporations becoming parties to the agreement were not designed or expected, through the intervention of their own stockholders, to maintain their organization and carry on their business is quite evidently disclosed by other provisions of this deed or plan of association, for the stock of each of the

corporations becoming in this manner associated was to be finally transferred to this board of eleven members, and in its place shares were to be issued by the association and divided among the corporations and distributed to their respective stockholders, in the proportion previously held by them in the corporations themselves, and ultimately to the amount of the shares of the Sugar Refineries Company. The earnings or profits of the business of the associated corporations were required to be paid over to the board, and that board was empowered to designate the dividend which should be proportionately distributed to the holders of the certificates issued by the board for its shares. And the certificates of stock of the corporations were to be held by this board, and it was empowered by the deed or plan only to transfer so much of them from time to time to such persons as it might be desired to qualify as trustees or directors or other officers of the corporations, and which were to be held by them 'subject to the provisions of this instrument.' No period of time was declared during which this association should continue to exist and manage the affairs of the corporations. But that it was intended to be of a durable character is evinced by the provisions made for the management of the business and for the selection and continuance in office of the members of the board. They were first selected and named in the agreement, one class of which were to hold office for seven years, the second class for five years and the third for three years, and at the expiration of their respective terms of office their successors were to be elected for the term in each case of seven years."¹

¹ "The capital of the association was fixed at the sum of \$50,000,000, a portion of which was to be retained to bring in other refining companies, but in every instance to be first incorporated and make them parties to the agreement or plan. This instrument was subscribed on the 16th of August, 1887, by twelve different corporations and individual concerns, the defendant being made a party to it at that time only by the signature of its secretary, and the power to do that was afterwards revoked. Other corporations engaged in the business

afterwards became parties to the arrangement, aggregating finally seventeen different companies employed in this business, leaving in the United States certainly no more than six other companies or firms engaged in this business. The association, therefore, appears to have been intended to include all the companies and firms of individuals engaged in this business in the United States. And, so far as it should prove successful in associating them, it would completely extinguish all competition between the corporations becoming members of

The agreement closed with a provision for strict secrecy, that "The said deed shall not be shown or delivered to any corporation, firm, person or persons whatsoever, except by the express direction or order of the board." The general effect of this agreement was stated by Judge Barrett as follows: "Thus we have a series of corporations existing and transacting business under the forms of law, without real membership or genuinely qualified direction — mere abstract figments of statutory creation — without life in the concrete or underlying association. Every share of stock has been practically surrendered and vital membership resigned. With the transfer to the eleven trustees the shareholders cease to occupy the position of *cestuis que trustent* with regard to the directors of the various corporations. In lieu thereof they accept substituted membership in an unincorporated board, and an entirely new, independent and exclusive trust relation with the trustees of the board. Nor are the trustees, as transferees of the capital stock of the various corporations, in any just sense genuine members thereof. They have no beneficial interest therein. Dividends are not declarable thereon, and they would not be payable to them in their own right nor as trustees for the shareholders in the particular corporation which had earned the dividend. Nor could the owners of the trust certificates, 'proportionately distributed' to such corporate shareholders, follow such dividend and require the trustees to account to them therefor. Whatever dividends are to be declared by the trustees must be so declared and paid from the aggregate fund; and whatever rights the holders of such trust certificates may have, as against the trustees, can only be enforced by the totality of certificate-holders, or a representative of that body. Again, the relation existing under the deed between the trustees of the trust and the directors of the corporations is not, as we have seen, the usual relation of shareholders and directors, but a strict contract relation. Ordinarily the directors of a corporation may use their honest judgment with regard to divi-

the association. Those who became parties to it were not only located in the state of New York, but in the state of Massachusetts, and apparently, from the names of the com-

panies, in the state of Ohio, in Missouri, in the state of Louisiana, and in the city of San Francisco." From opinion of supreme court by Daniels, J., 54 Hun, 354.

dends, and also as to the judicial application of profits. Here, however, the deed treats the directors of the various corporations as mere agents of the trust board, and in unqualified terms requires them to 'pay over the profits.' The effect of this would be the same even if individual members of the trust board were also shareholders in the corporations. As such individuals they would transfer their shares to the board and accept from the board their due proportion of the trust certificates. This board, as a board, takes all the shares of all the corporations, and the corporate shareholders, whether members of the trust board or not, by transferring their shares to these trustees, and accepting from the latter trust certificates, in effect abandon their corporations, relinquish their powers as shareholders, resign their functions as corporators, and look solely to the trust board for future guidance, control and profit. It is the first time in the history of corporations that we have heard of a double trust in their management and control—one set of trustees elected formally to manage the corporate affairs and a second set created to manage the first,—the shareholders in seventeen corporations leaving their functions with regard to their regular directors to be thought out and performed for them by what amounts to a board of guardians."

Action in the nature of a *quo warranto* was begun in the name of the people demanding judgment of forfeiture and dissolution of the North River Sugar Refining Company, upon the following grounds:

1. That it was a party to the combination created and constituted by the Sugar Refineries Company deed.

2. That the combination by the Sugar Refineries Company, being injurious to trade, was a criminal conspiracy and an indictable offense.

3. That the Sugar Refineries Company deed created a combination tending to monopoly, the prevention of competition and the enhancement of prices, and as such was illegal.

4. Corporate franchises being granted in trust upon condition that they be exercised to the attainment of the object for which they are granted, and that they be not abused to public detriment, any act of a corporation in violation of this grant and these duties forfeits its franchise.

5. The participation of the North River Sugar Refinery

Company in a conspiracy is ground for the forfeiture of its franchise.

6. The transfer by the North River Sugar Refinery Company of its control to a board not recognized by its charter is a forfeiture of its charter.¹

¹The counsel engaged in this celebrated case were Charles Tabor, attorney-general, and Roger A. Pryor for the people, and Messrs. Charles P. Dale, James C. Carter and John E. Parsons for the defendant. The briefs of both sides are summarized at length in 5 Ry. & Corp. Law Jour. 57. The principal points relied upon by counsel for the people, together with the authorities cited, are as follows:

Corporate franchises are granted upon condition that they be exerted to the attainment of the object for which they are conceded, and that they be not abused to the public detriment. For non-user or misuser they may be reclaimed by the state in the appropriate judicial proceeding. Sir James Smith's Case, 4 Mod. 53; Lord Holt in *City of London v. Vanacker*, 1 Ld. Raym. 496; *People v. Bristol, etc. Co.*, 23 Wend. 235, 236; *People v. Fishkill, etc.*, 27 Barb. 445, 452; *Kent, C., in Slee v. Bloom*, 5 Johns. Ch. 380; 2 *Waterman on Corp.*, § 427; *Ward v. Farwell*, 97 Ill. 593; *People v. Phoenix Bank*, 24 Wend. 435; *People v. Dispensary*, 7 Lans. 306; *Insurance Co. v. Needles*, 113 U. S. 574; *Terrett v. Taylor*, 9 Cranch, 43; 2 *Kent Com.* 812; *Com. v. Bank*, 21 Pick. 542; *Ang. & Ames on Corp.* (9th ed.), § 774.

Any act of a corporation in violation of law and to the public detriment forfeits its franchises. "It is a sufficient cause of forfeiture if the acts complained of are illegal either under the statute or at common law, or in violation of the inherent and fundamental principles or implied conditions of its existence."

Agreements tending to monopoly, *i. e.*, "any combination among merchants to raise the price of merchandise, to the detriment of the public" (Bouvier's Law Dict.), are illegal. *Arnott v. Coal Co.*, 68 N. Y. 558; *Stanton v. Allen*, 5 Denio, 434; *Clancy v. Salt Co.*, 62 Barb. 395; *Hooker et al. v. Vandewater*, 4 Denio, 349; *People v. Fisher*, 14 Wend. 9-19; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 172; *Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Santa Clara Valley M. & L. Co. v. Hayes*, 76 Cal. 387, 18 Pac. R. 391, 38 Alb. Law Jour. 279; *Bank v. King*, 44 N. Y. 87; *Case of Monopolies*, 11 Coke, 84b; *Raymond v. Leavitt*, 46 Mich. 477 (1889); *India Bagging Ass'n v. Kock*, 14 La. Ann. 164; *Ray & Whitney v. Mackin*, 100 Ill. 246; *People v. Stephens*, 71 N. Y. 545; *Marsh v. Russell*, 66 N. Y. 288; *Hartford, etc. v. N. Y. & N. H. R. R. Co.*, 3 Rob. 411; *Hilton v. Eckersley*, 6 E. & B. 47; *Central, etc. R. R. Co. v. Collins*, 40 Ga. 582; *Charles River Bridge v. Warren Bridge*, 11 Pet. 567; 2 *Kent*, 271, marginal note c; *Stewart v. E. & W. Transp. Co.*, 17 Minn. 372; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530, 13 N. E. R. 169, 2 Am. St. R. 124; *City of St. Louis v. Gas Light Co.*, 70 Mo. 69.

"Competition is the life of trade, and whatever destroys or even relaxes competition in trade is injurious if not fatal to it." *Hooker et al. v. Vandewater*, 4 Denio, 353; *People v. Fisher*, 14 Wend. 19; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Case of Monopolies*, 11 Coke, 84b; *Santa Clara Valley M. & L. Co. v. Hayes*, 76 Cal. 387, 18 Pac. R. 391, 38 Alb. L. J. 279;

It will be observed that many of the points urged are based upon the general principles governing corporation law, and have nothing to do with the validity of combinations generally.

Arnott v. Coal Co., 68 N. Y. 558; West Virginia v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. R. 527; Stanton v. Allen, 5 Denio, 434, 441; People v. Stephens, 71 N. Y. 545; Marsh v. Russell, 66 N. Y. 292; Hartford, etc. R. R. Co. v. N. Y. & N. H. R. R. Co., 3 Robt. 415; Brisbane v. Adams, 3 N. Y. 129; Livermore v. Poor, 5 Hun, 285; Wright v. Rider, 36 Cal. 342; Western Union Tel. Co. v. B. & O. Tel. Co., 23 Fed. R. 12; Balt. etc. Co. v. Western Union Tel. Co., 24 Fed. R. 319; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Western Union Tel. Co. v. Chicago & P. R. R. Co., 86 Ill. 246, 29 Am. R. 28; Denver & N. O. R. Co. v. A., T. & S. F. Co., 15 Fed. R. 650; Crawford v. Wick, 18 Ohio St. 190; Parker, J., in Mitchell v. Reynolds, 1 P. Williams, 181; Dunlap v. Gregory, 10 N. Y. 244; Lawrence v. Kidder, 10 Barb. 641; Chappel v. Brockway, 21 Wend. 163. See Leslie v. Lorillard, 110 N. Y. 519.

The character of the combination, whether tending to monopoly and injurious to the public, will be determined by the provisions of the instrument constituting it, and without reference to its effects in actual operation. Salt Co. v. Guthrie, 35 Ohio St. 666. In Hilton v. Eckersley, 6 E. & B. 47, 65, Lord Campbell, C. J., construing the monopoly agreement in question, said: "I do not think that any averment is necessary as to what has been done under it, or as to any mischief which it has actually produced. We are to consider what may be done under it, and what mischief may thus arise." Clancy v. Salt Co., 62 Barb. 395; Atcheson v. Mullan, 43 N. Y. 149; Hooker et al. v. Vandewater, 4 Denio, 352; Stanton v. Allen, 5 Denio, 440; Matter of Jacobs,

98 N. Y. 110; Mugler v. Kansas, 123 U. S. 661.

The combination created by "The Sugar Refineries Company" deed is a criminal conspiracy and an indictable offense. It was so at common law. Raymond v. Leavitt (1881), 46 Mich. 447; Rex v. De Berenger (1814), 3 M. & S. 67; Rex v. Hilbers (1815), 2 Chitty, 163; Rex v. Waddington, 1 East, 84, 94; People v. Melvin (1810), 2 Wheeler's Cr. Cas. 262; Com. v. Carlisle (1821), Brightley (Pa.), 36; 4 Black. Com. 158, 159; 1 Bish. Cr. Law, sec. 969; 1 Russ. Cr. Law, 168; 3 Inst., ch. 89. It is so in the state of New York by express provision of statute. Penal Code, sec. 168, subd. 6; People v. Fisher, 14 Wend. 9; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 172; Hooker v. Vandewater, 4 Denio, 349; Clancy v. Salt Co., 62 Barb. 395.

The contention of defendant is that it is not a party to the agreement or combination because not made such by any formal, regular corporate action. The controlling question of fact is not whether defendant was a party to the agreement, but whether it is in the combination? It is not a true proposition of law that the board of trustees is the only or the predominant power in a corporation. True, the "concerns" of defendant company are "managed" by its board of trustees (Act 1848, § 8); but the trustees are "elected by the stockholders" (Id.), who therefore constitute the ultimate and supreme power in the corporation. Nor is it a true proposition of law that the only misconduct for which a corporation is liable, when challenged for misconduct by the people, is the misconduct of the offi-

be thus created, but a monopoly in a legal sense can. The monopoly with which the law deals is not limited to the strict equivalent of royal grants or people's patents. Any combination the tendency of which is to prevent competition in its broad and general sense and to control and thus at will enhance prices to the detriment of the public is a legal monopoly. And this rule is applicable to every monopoly, whether the supply be restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible. Nor need it be permanent or complete. It is enough that it may be even temporarily and partially successful."

It will be observed that the grounds urged by Judge Barrett as sufficient reason for forfeiting defendant's charter were, with the exception of the last, entirely within the scope of corporation law. The question whether or not the combination amounted to a conspiracy is treated as entirely distinct from the other considerations.

On appeal¹ the supreme court affirmed the decisions upon these grounds:

1. The delegation and transfer of the management and government of the corporation to a body of men entirely distinct from that designated by the statute under which the corporation was organized amounted to an abandonment of the authority vested by law in the corporation, and by such acts it ceased to exercise the functions prescribed by law, and thereby offended against the provisions of the act under which it was created.

2. The defendant corporation became a party to an unlawful combination, the object of which was to control the production and sale of sugar in this country. In this connection the supreme court said: "The law does not require that instruments of this description, before they may be declared to be illegal, shall, in plain language, affirm the intention to be to prevent competition and control the market, or advance the prices of necessary commodities, as the articles of sugar, syrup and molasses clearly are. If it did, it would, by that requirement, supply a device for evading its wholesome restraints and rendering its principles utterly nugatory. That has never been exacted. But the courts, as in other cases, are permitted to

¹ See 54 Hun, 356, opinion by Daniels, J.

place themselves in the position of the parties entering into the agreement or arrangement to discover the objects or designs by which they have been actuated." And continuing: "In this case it was a leading object to combine together the different corporations and individuals engaged in this business, not only in and about the city of New York, but throughout the country, and to secure that control by a substantial organization for an indefinite period of time. This was not to be done, and was not, in fact, done for an idle purpose, or merely to furnish the means of protection against unlawful combinations or for any other mere economical object, but it was manifestly to place this business within the control and subject to the dictation of this association and of the board selected for the government of its affairs. And after putting forth the efforts necessary to secure that end, it would not only be idle but absurd to indulge in the supposition that it was not intended to wield the authority, in this manner secured, for the pecuniary advantage of the associates. And the direct and usual way in which that is accomplished, following out the common impulses of practical business men, is by the advancement of the prices of the commodities manufactured and sold, in the course of the business whose control may be in this way secured. When the opportunity to do that is provided, human selfishness is sure to turn it to a profitable account. A jury, certainly, would be fully justified in concluding, from the agreement and the other facts in evidence in the case, that the governing object of the association was to promote its interests and advance the prosperity of the associates, by limiting the supply, when that could properly be done, and advancing the prices of the products produced by the companies. To conclude otherwise would be to violate all the observations and experiences of practical life. This is a controlling feature in this controversy. And that it was intended to be secured by the organization provided for, and which actually took place, is reasonably free from doubt. And where that appears to be the fact, the agreement, association, combination or arrangement, or whatever else it may be called, having for its objects the removal of competition and the advancement of prices of necessities of life, is subject to the condemnation of the law, by which it is denounced as a criminal enterprise. The law at

this time, as it has for many years in this state, has made it a misdemeanor for two or more persons to conspire 'to commit any act injurious to the public health, to public morals or to trade or commerce, or for the perversion or obstruction of justice or of the due administration of the law.'¹ And combinations and associations of this form have been held, in this and other states, to violate these provisions of the statute, so far as they prohibit acts injurious to trade or commerce."

3. Defendant by becoming a party to the unlawful combination renounced and abandoned its own duties, and placed its interests under the control of a board which legally had no relation to it, thereby rendering itself liable to the judgment rendered. In this connection the supreme court said: "The defendant had disabled itself from exercising its functions and employing its franchises, as it was intended it should by the act under which it was incorporated, and had, by the action which was taken, placed itself in complete subordination to another and different organization to be used for an unlawful purpose, detrimental and injurious to the public; instead of manufacturing its product and disposing of it to the public on what might be fair competitive prices, it had become a party to a combination, in part at least, designed to create a monopoly, and exact from the public prices which could not otherwise be obtained. This was a subversion of the object for which the company was created, and it authorized the attorney-general to maintain and prosecute this action to vacate and annul its charter."

In affirming the decision of the supreme court the court of appeals reached the following conclusions:²

1. The defendant corporation became an integral part of a combination which absorbed most of its corporate functions,

¹ Penal Code, § 168, subd. 6.

² See 121 N. Y. 582. In this report of the case the deed of the Sugar Refineries Company is set forth in full at pages 585 to 595, inclusive. The serious character of the judgment sought is thus referred to by Judge Finch: "The judgment sought against the defendant is one of corporate death. The state, which created, asks us to destroy; and the

penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear

and dictated the terms and manner and details of its entire business activity. By directions of the combination it ceased to refine sugar, thereby lessening the supply upon the market.

2. The effect of such action was to divest itself of the essential and vital elements of its franchise by placing them in trust.

3. Defendant helped to create an anomalous trust which in substance and effect is a partnership of twenty separate corporations; it is a violation of law for corporations to enter into a partnership.

The court of appeals in affirming the decision expressly disregarded the argument urged that the defendant became part of an illegal monopoly, saying: "We have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter, and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our

and abundant reason. That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the state summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks. Two of the charges preferred in the complaint have dropped out of sight. They are of little importance, and have been prudently dismissed from the inquiry for that reason; and we are left to consider the one grave and serious accusation to which alone the proofs and argument have been directed. That accusation is adequate to the purpose for which it was framed, but upon two conditions, which dictate the line of inquiry and limit the area of discussion. It appears

to be settled that the state as prosecutor must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare. For the state does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may, and often do, exceed their authority where only private rights are affected. When these are adjusted all mischief ends and all harm is averted. But where the transgression has a wider scope and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty."

duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and independent corporations, whether directly or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute."

The final and controlling decision in this famous case turned, therefore, wholly upon the general principles applicable to corporation law, thereby illustrating the force of the proposition already advanced, that the trust form of combination is doubly vulnerable, in that charters of the constituent companies may be forfeited for reasons entirely independent of the legality or illegality of the combination itself.

§ 611. Standard Oil Trust.¹ — Action was begun by the state to deprive the Standard Oil Company, a corporation organized under the laws of the state of Ohio, of its charter on the ground that it had abused its corporate franchises by becoming a party to an agreement that was against public policy. It was charged that in violation of law and in abuse of its corporate powers, and in exercising the privileges, rights and franchise conferred upon it, the defendant corporation in 1882 became a party to certain trust agreements; that the holders of its capital stock, and all its officers and directors, signed the trust agreements without attaching the corporate name and seal of defendant company thereto; that thereby the company itself in effect and reality became a party to the agreements.²

¹ *State v. Standard Oil Co.* (1892), 49 Ohio St. 137, 30 N. E. R. 279.

² The two trust agreements provided that:

"(1) As soon as practicable a corporation shall be formed in each of the following states under the laws thereof, to wit: Ohio, New York, Pennsylvania and New Jersey; provided, however, that instead of organizing a new corporation any existing charter and organization may

be used for the purpose when it can advantageously be done.

"(2) The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum and all its products and all the materials used in such business, and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties pro-

The trust agreements provided generally that a corporation should be organized in each of four states, namely, Ohio, New York, Pennsylvania and New Jersey; that all assets and business of the parties to the trust agreements situated in each state

curing the charter, or if necessary to comply with the law the powers aforesaid may be restricted and reduced.

"(3) At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other states and territories.

"(4) Each of said corporations shall be known as the Standard Oil Company of — (and here shall follow the name of the state or territory by virtue of the laws of which said corporation is organized).

"(5) The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same, in view of the purpose to be accomplished.

"(6) The shares of stock of each of said corporations shall be issued only for money, property or assets, equal at a fair valuation to the par value of the stock delivered therefor.

"(7) All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred to and vested in the said several Standard Oil Companies. All of the property, assets and business in, or of, each particular state shall be transferred to and vested in the Standard Oil Company of that particular state, and in order to accomplish such purpose the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this

agreement) to sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets and business of said corporations and limited partnerships. Correct schedules of such property, assets and business shall accompany each transfer.

"(8) The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all the property, real and personal, assets and business mentioned and embraced in schedules accompanying such sale and transfer to the Standard Oil Company or companies, of the proper state or states, as soon as the said corporations are organized and ready to receive the same.

"(9) The parties embraced in class third of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignment of stocks in the same or similar companies upon the terms herein provided, and that whenever and as often as all the stocks of any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and per-

should be transferred to the corporation organized in that particular state, and payment made therefor in the stock of the transferee company, which stock should be delivered to nine trustees, and no stock of any of said companies should ever be issued except to the trustees to be held subject to the trust specified. In return for the stock so delivered the trustees were to issue trust certificates of like value to the several stockholders. Complete power to manage the several companies was vested in the trustees. The case came before the supreme court of Ohio upon a demurrer to the answer of the corpora-

sonal, of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper state on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the value of the money, property and business assigned, to be held in place of the stocks of the company or companies assigning such property.

"(10) The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property and business so transferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors, and no stock of any of said companies shall ever be issued except for money, property or business equal at least to the par value of the stock so issued, nor shall any stock be issued by any of said companies for any purpose, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however that this provision is not intended to restrict the purchase, sale and exchange of property by said Standard Oil Companies as fully as they may be authorized to do by

their respective charters, provided only that no stock be issued therefor except to said trustees.

"(11) The consideration for any stocks delivered to said trustees as above provided for, as well as for stocks delivered to said trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto, of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Companies so received by said trustees, and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of the Standard Oil Companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer, and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do."

tion to the petition of the attorney-general, and the questions discussed were:

1. Should the defendant, the Standard Oil Company, be regarded as a party in its corporate capacity to the agreement constituting the Standard Oil Trust.

2. Had the company power to become a party to such an agreement.

3. If so, is the right of the state to demand a forfeiture of its corporate franchises, or of the power to make and perform such agreements, barred by lapse of time.

In answer to the first question it was held that the corporation was not a legal entity separate from its stockholders. And the action of the officers and stockholders in signing the trust agreements was virtually and in effect the action of the company, since the property and assets of the corporation could only be transferred by corporate act. In this connection the court said: "Applying then the principle that a corporation is simply a corporation of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a cor-

poration, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all or a majority of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the use of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*.”¹

As regards the power of the company to become a party to the trust agreement the court said: “That the nature of the agreement is such as to preclude the defendant from becoming a party to it is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships and individuals, who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and being enjoined by the terms of the agreement to endeavor to have ‘the affairs’ of the several companies managed in a manner most conducive to the interest of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay, more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders and conformable to the purpose for which it

¹ See § 607 and note.

was created by the laws of the state. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York city, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products, through the entire country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our state and void."¹

¹ In this connection the court cited *Salt Co. v. Guthrie* (1881), 85 Ohio St. 666; *Emery v. Ohio Candle Co.* (1890), 47 id. 320, 24 N. E. R. 660; *Cook on Stock and Stockholders*, sec. 503a; *Wait on Insolvent Corporations*, sec. 487. Regarding the contention that many beneficial results had been attained by the operation of the oil trust, the Ohio court said: "Much has been said in favor of the objects of the Standard Oil Trust and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended, and is well answered in *Richardson v. Buhl*, 77 Mich. 632, 48 N. W. R. 1102. After commenting on the tendency of the combination known as the Diamond Match Company to prevent fair competition and to control prices, *Champlin, J.*, said: 'It is no answer to say that this monopoly has in fact reduced

the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree.' . . . A society in which a few men are the employers, and the great body are merely employees or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited the monopoly had been created by letters patent. But the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same whether created by patent or by an extensive combination among those engaged in similar industries controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust."

The court also held the right of

§ 612. Distillers and Cattle Feeders' Trust.¹—The Nebraska Distilling Company was a corporation organized under the laws of the state of Nebraska. Action of *quo warranto* was instituted to forfeit the company's charter, upon the ground that the company had become party to an illegal trust. In 1887 certain parties interested in certain distilleries located northwest of the Ohio river formed an unincorporated association known as "The Distillers' and Cattle Feeders' Trust," with its headquarters at Peoria, Illinois; the object of which trust was to control the production of highwines, alcohol, spirits and other liquors, and to regulate prices of same, and to control competition. It was found by the referee in the Nebraska case that "the object and purpose of the trust are accomplished by its getting the control and management of as many distilleries as possible, and the mode of procedure is as follows: An arrangement or agreement is made by which the company is to transfer its capital stock to the trustees of the Distillers' and Cattle Feeders' Trust, for which said trustees are to issue certificates of the trust. The real estate upon which the distillery plant is situated is deeded to some one member of the company as trustee for the stockholders, and the trustee then leases said real estate to the company for the term of twenty-five years. The capital stock of the company is canceled and new stock issued to said nine trustees of the trust, for which the trustees give the agreed amount of certificates of the trust. The board of directors of the company resign and a new board is elected, a majority of whom are taken from the nine trustees of the trust. That prior to the formation of said trust, various distillers had formed what are called pools, the object of which was to prevent an over-production of alcohol, spirits and liquors. In the absence of such a combination there was a tendency to over-production and to furnish a supply beyond the demands, the consequence of which was to lower the price of the production and make the business un-

the state to begin an action to forfeit the charter was not barred by lapse of time under the Ohio statute.

¹ State v. Nebraska Distilling Co. (1890), 29 Neb. 700, 46 N. W. R. 155. See also Distilling & Cattle Feeding Co. v. People (1895), 156 Ill. 448, 41 N.

E. R. 188, wherein the history of the organization of the trust and of the Distilling & Cattle Feeding Company, which was the corporation which succeeded the trust, is given at length.

profitable. Owing to an inherent infirmity in the pooling system, it failed to accomplish its full purpose, and as a substitute therefor said trust was formed. The trustees of the trust have almost unlimited power and control over all distilleries that enter it. They can limit their production or suspend their operation altogether. From ninety to one hundred and ten distilleries are located north and west of the Ohio river, of which number about seventy-five or eighty have entered the trust, and of the number under the control of the trust about fourteen are kept running. The trustees confine the production of the distilleries under their control to the large houses situated in favorable localities, which can be run at less expense than small houses located in unfavorable places; of the distillery plants in actual operation, about six are located in Peoria, the headquarters of the trust. That the corporate stock assigned and transferred to said trustees is owned and held by them in common, and they acquire thereby the rights and powers of shareholders and exercise full control and direction of the action, management and business of the companies whose stock has been so assigned and transferred to them as aforesaid, and they are enabled thereby to regulate, and do to a great extent regulate, at will the production and price of alcohol, spirits and other liquors in the state of Nebraska and in the United States. The said trustees can, and do, at will restrict and limit the production and supply of alcohol, spirits and other liquors, and thereby enhance their value."

The Nebraska corporation became a party to the trust by transferring its capital stock to the nine trustees and receiving in return therefor certificates of the Distillers' and Cattle Feeders' Trust, whereupon, in 1888, by order of the trustees, the Nebraska plant was closed and ceased operations.

The company was ousted of its charter upon the ground that it became party to an unlawful agreement.

That the trust agreement was in restraint of trade, tended to destroy competition and create a monopoly, and was therefore contrary to public policy, and void.¹

¹ In reaching these conclusions the court relied on *Mitchell v. Reynolds*, 1 P. Wms. 181; *Horner v. Ashford* (1825), 3 Bing. 322; *Horner v. Graves* (1831), 7 Bing. 735; *Hayward v. Young* (1818), 2 Chitty R. 407; *Lange v. Werk* (1853), 2 Ohio St. 519; *Lawrence v. Kidder* (1851), 10 Barb. 641; *Pierce v. Fuller* (1811), 6 Mass. 223; *Palmer v. Stebbins* (1825), 3 Pick. 188;

Alcohol is an article of commerce; it is applied to many uses in arts and manufacture; the amount used in the production of intoxicating drinks forms but a small part of the quantity actually distilled; therefore, any contract creating a monopoly therein is against public policy, and void.

The object of the Nebraska corporation in entering into the illegal combination being to destroy competition and creating a monopoly, not only by limiting production of alcohol, but by dismantling distilleries, and thereby absolutely preventing the manufacture of an important article of commerce except in a few establishments controlled by the trust, its action is contrary to law, and any contracts entered into with such an object in view are null and void; therefore the conveyance from the Nebraska corporation to the trust of any of its assets was in contravention of the powers conferred upon it by statute, and no title passed.

The supreme court of Illinois, in a case involving the legality of the corporation which succeeded the Distillers' and Cattle Feeders' Trust, spoke of the latter association as follows:¹ "There can be no doubt, we think, that the Distillers' and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was, therefore, illegal. No one who intelligently considers the scheme of this trust, as detailed in the information, can for a moment doubt that it was designed to be, and was in fact, a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition, and to be able to dictate the amount to be manufactured and the prices at which the same should be sold, and thus to create, or tend to create, a

Whitney v. Slayton, 40 Me. 224; Nobles v. Bates (1827), 7 Cow. 307; Duffy v. Shockey (1858), 11 Ind. 70; Bowser v. Bliss (1845), 7 Blackf. 344; Beard v. Dennis (1855), 6 Ind. 200; Chappel v. Brockway, 21 Wend. 158; Coal Co. v. Coal Co., 68 Pa. St. 173; Craft v. McConoughy (1875), 79 Ill. 346; Central R. R. Co. v. Collins (1869), 40 Ga. 582; Hazelhurst v. Railroad Co., 43 id. 13; West Virginia Trans.

Co. v. Ohio River Pipe Line Co. (1883), 23 W. Va. 600; People v. Chicago Gas Trust Co. (1889), 130 Ill. 268, 22 N. E. R. 798; Richardson v. Buhl (1889), 77 Mich. 632, 43 N. W. R. 1102; Salt Co. v. Guthrie, 35 Ohio St. 666; Nav. Co. v. Railway Co., 130 U. S. 1.

¹See Distilling Cattle Feeding Co. v. People (1885), 156 Ill. on p. 486, 41 N. E. R. 188.

virtual monopoly in the manufacture and sale of products of that character. No other business principles can be suggested upon which the development of such an elaborate and far-reaching scheme can be accounted for. No rational purpose for such organization can be shown consistent with an intention to allow business to run in its normal channels, to give competition its legitimate operation, and to allow both production and prices to be controlled by the natural influences of supply and demand, and the results, as shown by the information, were such as might be anticipated. The trust obtained possession of nearly all the distillery product of the United States, thus enabling it to dictate prices and the amount of production, and to thus draw to itself the substantial control of the distillery business of the country. Combinations of this character have been frequently made the subject of judicial investigation within the last few years, and while the proceeding has most generally been against some one of the corporations entering into the trust, the courts, so far as they have had occasion to speak on the subject at all, have held such trusts to be illegal."

§ 613. American Cattle Trust.¹—In 1887 thirteen parties in the city of New York organized a voluntary association called the "American Cattle Trust." "The general object contemplated by the parties who unite in the establishment of this trust is to encourage, develop and secure improved methods and economics in the production, transportation, distribution, handling and sale of cattle, sheep, hogs and other animals, and of the food and other products produced or manufactured from them, or any or all of them, in the United States or elsewhere, and to transact any and all other business incident thereto growing out of or connected therewith, or with any or all of them."

The object of the trust was to receive from the various owners and holders the stock of corporations engaged in the business described. The trustees were to hold the stock in trust for the original owners, and to issue in lieu thereof trust certificates; by this means it was expected to secure control of the various corporations engaged in live-stock business. In the language of the chairman of the trust, "It was hoped and be-

¹ Gould v. Head et al. (1889), 38 Fed. R. 886.

lieved that by associating a number of live-stock properties in different sections of the country advantage could be taken of favoring circumstances possessed by these different properties, but not common to all; . . . that, in short, by uniting the different properties, putting them under a common management, introducing economy, husbanding resources, the live-stock business could be profitably conducted; that, in order to secure efficient management thereof, the entire property thus associated, and the absolute control of the same, was vested in a board of trustees."

The legality of the trust came before the courts upon the filing of a bill by a party who had exchanged his stock in one of the constituent corporations for trust certificates, and who sought to get his original stock back. In granting the relief prayed for the court said: "The corporations thus associated renounced autonomy, but not their existence. They committed their affairs into the hands of the trust, because they could be better managed by the trust than by themselves. They still lived and owned their property, but the trust was a regency of their own creation with absolute and irrevocable power over all their concerns. Ten corporations are mentioned in the affidavits as thus united in the trust, not by the direct act of the corporations, but by transfer of their stock to the trust, or to persons holding in its interest. And it is urged that by some general expressions in the articles of association the trust was given absolute authority to sell and dispose of the stock in its discretion. But this interpretation is not in accord with the purpose for which the trust was organized. The stock was transferred to the trust, not for the purpose of being sold, but to give control of the corporation; to make the officers puppets in the hands of the trust, and thus substitute the latter as the governing body of the corporation. In other words, the purpose of the association was not to buy and sell corporations in open market, but to manage and control them. In this view it is clear enough that the sale of the stock by the trust was wholly inconsistent with the scheme of its organization. The doctrine leads to *felo de se*. If by selling the stock of one corporation and thus parting with its control over it the trust may renounce its function, the same course may be pursued as to all the corporations in its control. This cannot be. It is

absurd to suppose that the projectors of the scheme would thus implant in it the seeds of dissolution. So that if we accept the articles of association for all that they purport to be, there was in the trust no power to sell the stock of the corporations which it held. Furthermore, the transfer of stock to the trust was without consideration. The trust had no property and no expectation of acquiring any. As before stated, it was organized for controlling corporations and not for holding or acquiring property in its own right. The certificates of the trust issued in exchange for the stock of the Phoenix Farm & Ranch Company were on their face 'shares in the equity to the property held by the trustees of the American Cattle Trust,' and did not convey any property whatever. The stock thus obtained was given to complainant in exchange for other certificates of the trust, which he says he had previously purchased for a valuable consideration. To allow the trust to acquire stock from some of its members and transfer it to others by issuing and canceling certificates in this manner would be nothing less than common jugglery. Upon all that appears in the record it must be said that the trust was without authority to alienate any of the stock of the several corporations in its control, and therefore complainant's title to the stock of the Phoenix Farm & Ranch Company is not good."

§ 614. **American Preservers' Trust.**¹ — The American Preservers' Trust was a voluntary association formed originally by the stockholders of seven corporations located in different parts of the United States, and all engaged in the fruit-preserving business. The trust agreement provided that it should go into effect sixty days from the time that the parties holding the majority of the stock in the seven corporations should have transferred their stock to a board of nine trustees; it authorized the trustees to prepare and issue trust certificates for stock, bonds or other property transferred to them; they were also authorized to purchase the stock, bonds and property or business of any corporation or firm engaged in the fruit-preserving business that was not originally concerned in the trust, or to lease the

¹ *American Preservers' Trust v. American Preservers' Company*, which corporation was organized by the trust, *Taylor Mfg. Co. et al.* (1891), 46 Fed. R. 152. For a history of the trust see *Bishop v. American Preservers' Co.* (1895), 157 Ill. 284, 41 N. E. R. 765.

property of such firm; also to organize corporations to carry on the fruit-preserving business, and to control such corporations by means of the acquisition of their stock.

A certain corporation organized under the laws of the state of Missouri became a party to the trust agreement, and covenanted that, in consideration of its admission to the trust, it would not engage in the business for which it was organized for a period of twenty-five years. The trust sought to enforce this agreement by an application for an injunction restraining the Missouri corporation from doing business contrary to the agreement. The prayer for injunction was denied upon the ground that the organization of the trust was contrary to law. The question presented to the court was whether a corporation organized under the laws of the state of Missouri had the right to become a member of such an association, or to appoint such agents as the trustees, with such exclusive powers, and this question the court answered in the negative.¹

¹The court relied upon *People v. Refining Co.* (1890), 121 N. Y. 582, 24 N. E. R. 834; *Mallory v. Oil Works*, 86 Tenn. 598, 8 S. W. R. 396; *State v. Distilling Co.* (1890), 29 Neb. 700, 46 N. W. R. 155; *Whittenton Mills v. Upton* (1858), 10 Gray, 596. In conclusion the court said: "The ultimate question is whether the covenant to discontinue one branch of its business, made under the circumstances and for the considerations disclosed by the bill, can be enforced in equity against the defendant corporation. An injunction as prayed for, if granted, will operate, of course, as a specific enforcement of the covenant; and the general rule is that agreements will not be specifically enforced that are inequitable, or tainted with illegality, or that are in excess of corporate powers. As the case is stated in the bill, the only fair pretense that there seems to be for seeking equitable relief is the fact that the Taylor Manufacturing Company still retains the money that it received for the transfer of its manufacturing plant. But it must

be borne in mind, as heretofore shown, that the money so received for the transfer of its plant was not by any means the sole consideration upon which it covenanted to discontinue the manufacture and sale of preserves. One of the inducements held out to it for entering into that covenant was the advantage that would result to it or to its stockholders from its becoming a member of the trust, and enlarging the sphere of its operations through the agency of that organization; but, as it now appears, the defendant company had no right to become a member of the trust, and all its acts done in that behalf were *ultra vires*, if not positively illegal. In view of the unlawful character of the transaction out of which the covenant arises, I conclude that a court of equity would not be warranted in enforcing it by injunction, even though the defendant company has received, and still retains, a portion of the consideration which induced it to execute the covenant."

The same trust was indirectly discussed by the supreme court of Illinois¹ in a case involving the legality of the American Preservers' Company. A certain party named Bishop, doing business in Chicago, signed the trust agreement under a threat that unless he did so the trust would be able to force him out of business. When the corporation that succeeded the trust was organized Bishop was required to turn over his business and assets to the corporation, receiving in return therefor certain shares of stock in the corporation, which shares were assigned to the trustees of the trust, who issued in lieu thereof trust certificates. It was contended that the American Preservers' Company was simply an instrument in the hands of the trust and had no independent existence as a corporation. Some time later Bishop tendered his trust certificates to the managers of the trust and demanded that the trust return to him the various articles inventoried in his bill of sale. He afterwards refused to account to the trust and continued to manage his business for himself, whereupon the American Preservers' Company instituted an action of replevin to recover the possession of the stock in trade, machinery and equipments covered by the bill of sale made by Bishop.²

It was contended on behalf of the corporation that the agreement having been executed the corporation was entitled to the benefit of the consideration, even though the agreement, if executory, would not have been enforced. The trial court took the view "that the plaintiff was an independent and legally organized corporation, and that, as the defendant had executed a bill of sale of his property and business to that corporation and then assumed to act as its custodian and agent in the management of the property and business, he was estopped from denying the plaintiff's title or right of possession."

On behalf of the defendant "it was claimed that a combination was formed among all the manufacturers of and dealers in fruit butters, jellies, preserves and like products in the United States under the name of the 'American Preservers' Trust,' for the purpose of controlling the manufacture and sale of said products, and preventing competition therein, and raising the market price thereof, and thereby securing a monopoly therein;

¹ Bishop v. American Preservers' Co. (1895), 157 Ill. 284, 41 N. E. R. 765. ² The trust agreement is set forth in full in the report of this case.

that this combination was organized and sought to effect its purpose under and in pursuance of a written agreement signed by the parties to the combination; that the plaintiff company was formed in accordance with the provisions of this agreement and for the purpose of accomplishing the objects of the trust; that those objects were illegal and against public policy; that the agreement was illegal and void as providing for a combination in restraint of trade in staple articles of food in general use and demand by the inhabitants of Illinois; and that the transfer of defendant's goods and machinery and business by means of a bill of sale to the plaintiff, and the delivery of the shares of stock to defendant, and the redelivery thereof to the trustees of the combination in exchange for trust certificates, and the appointment of defendant as custodian of the property and agent to carry on the business theretofore exclusively his own, were all parts of the illegal scheme and aids in the accomplishment of the unlawful objects of the trust." The supreme court held broadly that there could be no doubt that the trust agreement was an illegal contract, in that it provided for such a combination in restraint of trade as is forbidden by public policy.¹

After reciting the terms of the agreement and referring to the authorities the court said: "It will thus be seen that the agreement in question makes provision for welding together all the interests engaged in the business named in the agreement into one giant combination or partnership under the absolute dominion and control of a board of nine trustees. Its illegal purpose is apparent upon its face, and therefore, under the decisions above referred to, it must be held to be void as being injurious to the public interests."²

¹ In support of this conclusion the court relied upon *Craft v. McCoughy* (1875), 79 Ill. 346; *People v. Chicago Gas Trust Co.* (1889), 130 Ill. 268, 22 N. E. R. 798; *More v. Bennett* (1892), 140 Ill. 69, 29 N. E. R. 888; *Case of Monopolies*, 11 Coke, p. 84*b*; *Arnott v. Coal Co.* (1877), 68 N. Y. 559; *Morris Run Coal Co. v. Barclay C. Co.* (1871), 68 Pa. St. 173; *Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Mill & Lumber Co. v. Hayes*, 76 Cal. 387; *American*

Preservers' Co. v. Taylor Mfg. Co. (1891), 46 Fed. R. 152.

² Continuing the court said: "The object of the testimony of the defendant upon the trial below was to show that the plaintiff, the American Preservers' Company, was a party to this illegal combination, and that the execution of the bill of sale to it was to enable it to carry out the unlawful designs of such combination. If this testimony as offered

§ 615. **Chicago Gas Trust.**¹— There were four separate and independent gas companies doing business in the city of Chicago. In April, 1887, a new corporation, called the “Chicago Gas Trust Company,” was organized under the general incor-

had been received it would have tended to show, not only that the plaintiff company was under the control of this board of trustees, but that it was in a partnership with other corporations. The corporators' names in plaintiff's charter and whose names are signed to the agreement therein set out, upon the basis of which they were declared to be a corporation, were trustees in the trust. The court below ruled out testimony showing that these trustees held stock in more than a dozen different corporations, in the different states of the Union, besides the stock in the plaintiff company transferred to it by the defendant and others. The agreement was illegal as providing for a partnership among corporations. It is a violation of the law for corporations to enter into partnership. The provisions of the general incorporation act of Illinois are to the effect that every corporation organized in this state must manage its own affairs separately and exclusively, and cannot enter into any contract or relation by which it is divested of such power of exclusive management, or by which its franchises are vested in a partner or any outside board, with equal power to direct its business. *Whittenton Mills v. Upton* (1858), 10 Gray, 582; *People v. N. R. S. R. Co.* (1890), 121 N. Y. 582, 24 N. E. R. 834. The appellee here, a foreign corporation, so far as it was doing business in this state through any control which it assumed to exercise over the business transferred to it by appellant, was subject to the same restrictions and duties as corporations

formed in this state, and could have no other or greater powers. 1 Starr & Cur. Stat., ch. 32, sec. 26. It was therefore unlawful for it to be operating in this state as a member of a partnership of corporations.”

Upon two other points involved in the case the court said: “But it is urged that, even if the trust agreement was illegal in the respects and for the reasons above indicated, yet its illegality could not prevent a recovery in this action of replevin for the alleged reasons that the motive of parties forming a corporation cannot be inquired into in a collateral proceeding; that the contract evidenced by the bill of sale was an executed one; and that defendant having received the goods as agent of the plaintiff could not assert a claim adverse to his principal. It is not necessary to discuss the doctrine contended for by appellee, that where a corporation, as indicated by its articles of association, is legal, and the incorporation is effected in the manner prescribed by law, the intention of the corporators is immaterial. The purpose of the offered testimony was to show that the sale made to the appellee was an illegal sale, and that the bill of sale, upon which appellee relied to show its title and right of possession, was executed to accomplish an unlawful object. Such proof was entirely consistent with the *de facto* existence and legal organization of appellee as a corporation. Appellant offered to prove that he was compelled by Ryan to sign the trust agreement in May, 1888, by the threat that his business would be ruined by the manufacturers and

¹ *People v. Chicago Gas Trust Co.* (1889), 130 Ill. 268, 22 N. E. R. 798.

poration act of the state. Its capital stock was \$25,000,000, and its objects were, in brief, to operate gas plants in the city of Chicago and elsewhere in the state of Illinois, "and to purchase, and hold or sell the capital stock, or purchase or lease or operate the property, plant, good will, rights and franchises

dealers who had agreed to form the trust; and he swore that he had never heard of appellee until the following July, when Ryan came to him and told him that he must sign the bill of sale to the company, in order to put the stock into the trust. It may be a serious question whether there was any real sale of the property described in the bill of sale. A sale presumes a vendor on one side and a vendee on the other, each having life and existence and the power and ability to contract, and each acting independently and of his own free choice. But here the vendor, Bishop, and the vendee, the American Preservers' Company, were controlled and directed by an outside force, the trustees named in the trust agreement acting through Ryan, their representative. Ordinarily the vendee becomes owner and does what he pleases with his own, but here the trust agreement in effect directs the vendee upon what terms it shall hold the property transferred to it, and limits the further sale of the same. Ordinarily the vendor fixes the price of what he sells, but here the trust agreement virtually leaves the fixing of the value of what is sold to the trustees. The proof introduced showed that appellant had nothing to do with arranging for three hundred and thirty-one shares of stock in the appellee company as the value of his property and business, nor did he determine that six hundred and sixty-two certificates of trust were a fair equivalent for the stock. All this was settled and arranged beforehand by Ryan. *People v. N. R. S. R.*

Co., supra. But if it be assumed that appellant executed the bill of sale and submitted himself to the control of the trustees or of appellee voluntarily and of his own free will, then it follows that he was *particeps criminis* with them in the unlawful venture. He, as well as appellee, was a party to the unlawful contract evidenced by the bill of sale. If appellee had been an individual instead of a corporation, and appellant had executed the bill of sale for the purpose of defrauding his creditors, it will not be contended that the bill of sale could be relied upon as a basis of recovery by either party. . . . In the case at bar the appellant never parted with the possession of the property. After he executed the bill of sale he still continued his business the same as before, though subject to the orders and direction of the trust. The beginning of the action of replevin admits his possession, as replevin does not lie against one not in possession. *Wells on Replevin*, 77; *Hall v. White* (1871), 106 Mass. 599. We see no reason why the doctrine of the *Kirkpatrick* case does not apply here, although the action is replevin and not ejectment, and although the property involved is personalty and not real estate. The bill of sale rests under the ban of the law as well when executed to carry out the illegal agreement hereinbefore set forth as if it had been made for the purpose of defrauding creditors. The law will not aid the appellee to recover the property, but will leave both it and appellant where they were when the suit was begun."

of any gas works, or gas company or companies, or any electric company or companies, in said city of Chicago, Cook county, Illinois, or elsewhere in said state of Illinois, as said corporation may, by vote of the majority of the stockholders, elect; and to purchase, hold, sell, operate or anywise become interested in coal or other properties productive of material necessary or useful in the supply or manufacture of gas, or other agency or medium of light, heat, power or fuel, and to sell, improve, enlarge, extend, maintain, operate or demise any and all property so purchased or leased."

The corporation did not undertake to erect or operate any plants to manufacture gas, but it did acquire and hold a majority of the shares of the capital stock of the four gas companies then doing business in the city of Chicago, thereby controlling the companies.

Upon an information in the nature of a *quo warranto* filed by the attorney-general, the question presented to the supreme court by the demurrers to the pleas of the corporation was whether or not the Gas Trust Company had the right to purchase and hold the stock of the other gas companies.¹

¹ Regarding one of the contentions of counsel for the corporation the supreme court said: "A distinction is sought to be drawn between 'capital stock' and 'shares of stock.' It is said that capital stock means the entire property owned by the corporation, while a share in the stock is the right to partake, according to the amount put into the fund, of the surplus profit obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. It is therefore insisted by the appellant that even if the charter of the appellee can be held to confer the power to purchase and hold the general property or funds of other gas companies, it does not for that reason confer the power to purchase and hold shares of stock in such other companies. The distinction contended for undoubtedly exists under certain circumstances and for certain purposes,

but we think that, in the present case, the words 'the capital stock of any gas company or companies' are broad enough to include shares of stock. In the general incorporation act, under which the appellee and the Consumers' Gas Company and the Equitable Gaslight & Fuel Company are all organized, the 'statement' is required to set forth 'the name of the proposed corporation, the object for which it is formed, its capital stock, the number of shares of which such stock shall consist,' etc. The original charter of the Chicago Gaslight & Coke Company provides that 'the capital stock of said company shall not exceed \$300,000, to be divided into shares of \$25,' etc. The charter of the People's Gaslight & Coke Company, as amended in 1865, also provides that its capital stock may be divided into shares. The terms thus used designate the capital stock of a corporation as that

It is well settled that a corporation can exercise only such powers as are conferred by statute or charter, either in express terms or by necessary implication.

Implied powers are only those powers which are essential to enable the corporation to carry out the express powers granted and to accomplish the objects of its creation.

An incidental power is a power that is directly and immediately appropriated to the execution of the express powers granted. Powers that have very slight or remote relations to the express powers granted do not fall within the definition of incidental powers.¹

Following these general principles, the supreme court said, concerning the powers of the Gas Trust Company: "Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas-works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. 'The right of a corporation to invest in shares of another company cannot be implied because both companies are engaged in a similar kind of business.'"² And continuing, the court said: "It is true that a gas company might take the stock of another corporation in payment of a debt, or perhaps as security for a debt, but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specifically granted power to operate gas-works and manufacture gas. Some corporations, like insurance companies, may find it necessary to keep funds on hand for the payment of losses by death or fire, or to meet other necessary demands, but it is questionable whether even

which consists of or may be divided into shares. Hence, for the purposes of the present discussion, 'the capital stock of any gas company' may be regarded as the aggregate of all the shares of such stock."

¹ See *People v. Gas Trust Co.* (1889), 130 Ill. 268, 22 N. E. R. 798; *C., P. &*

S. W. R. R. Co. v. Marseilles (1877), 84 Ill. 643; *Chicago Gas Light Co. v. People's Gas Light Co.* (1887), 121 Ill. 530, 13 N. E. R. 169; *Hood v. N. Y. & N. H. R. R. Co.* (1852), 22 Conn. 1; *Franklin Co. v. Lewiston Savings Inst.* (1877), 68 Me. 43.

² 1 Morawetz on Corp., sec. 431.

these can invest their surplus funds in the stocks of other corporations without special legislative authority. But there is nothing in the nature of a gas company which renders it proper for such a company to accumulate funds for outside investment; its surplus profits belong to the stockholders, and, when distributed among them, can be used by them as they see fit. If, then, the power to purchase outside stocks cannot be implied from the power to operate gas-works and make and sell gas, a company to whom the latter power has been expressly granted, cannot exercise the former without legislative authority to do so. This is the law as settled by the great weight of authority."

The grounds upon which the supreme court sustained the demurrers to the pleas of the corporation may be summarized as follows:

1. The main object for which the Gas Trust Company was formed was to operate works for the manufacture and sale of gas, and the organization of the company for this purpose was entirely lawful.

2. The power to purchase and hold the stock of other gas companies could not be lawfully exercised as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas.¹

¹The court said: "Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted and to accomplish the purposes of their creation. *C. P. & S. W. R. R. Co. v. Marseilles* (1877), 84 Ill. 643; *Chicago Gas Light Co. v. People's Gas Light Co.* (1887), 121 id. 530, 13 N. E. R. 169. An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. *Hood v. N. Y. & N. H. R. R. Co.* (1852), 22 Conn. 1; *Franklin Co. v. Lewiston Savings Inst.* (1877), 68 Me. 43.

"A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools.' The authorities referred to by these text-writers sustain the conclusions announced by them. It has been held in many cases that 'in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law,' and that 'one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute.' *Franklin Co. v. Lewiston Sav. Inst.* (1877), 68 Me. 43; *Franklin Bank v. Commercial Bank* (1881), 36 Ohio St.

3. The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature.

4. When a corporation is formed under the general incorporation act for the purpose of carrying on a lawful business, the law, and not the statement, or the license, or the certificate, must determine what powers can be exercised as incident to such business. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business.¹

5. The control of the four companies by the trust company suppressed competition, and built up a monopoly in the manufacture and sale of gas.²

350; *Milbank v. N. Y., L. E. & W. R. Co.* (1882), 64 How. Pr. 20; *Sumner v. Marcy*, 3 W. & M. 105; *Mechanics' & Workmen's Mut. Savings Bank v. Meriden Agency* (1853), 24 Conn. 159; *Central R. R. Co. v. Collins* (1869), 40 Ga. 582; *Hazelhurst v. Savannah R. R. Co.* (1871), 43 id. 13; *Berry v. Yates* (1857), 24 Barb. 199."

¹In this connection the Illinois court said: "We have already seen that, where the object of forming a gas company is to engage in the business of making and selling gas, the purchase of stock in other companies is not necessary to carry such object into effect. Therefore the general incorporation act not only does not expressly authorize the purchase of such stock, but impliedly forbids it in cases where the main purpose of the corporate creation is other than the purchase and sale of stocks. It has been held that the powers obtained by corporations organized under general laws are necessarily restricted to those mentioned in the act (*Medical Coll. Case* (1838), 3 Whart. (Pa.) 445); that in such cases the charter is void as to all powers and privileges granted beyond the provisions of the statute

(*Heck v. McEwen* (1883), 12 Lea (Tenn.), 97); that, if unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void (*Eastern Plank R. Co. v. Vaughan* (1856), 14 N. Y. 546); that anything in such articles not warranted by the statutes, authorizing the formation of corporate bodies, is void for want of authority (*Oregon Ry. Co. v. Oregonian Ry. Co.* (1888), 130 U. S. 1); and that such articles must be construed strictly, and against the grantee and in favor of the government of the general public (*Id.*). Our conclusion upon this branch of the case is that, if the Chicago Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas-works and manufacturing and selling gas, it has no power to purchase and hold or sell shares of stock in other gas companies as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation."

²"The fact that the appellee almost immediately after its organization bought up a majority of the shares of stock of each of these com.

6. Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy, and is therefore unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy.¹

panies shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago.

"The general incorporation act provides 'that corporations may be formed in the manner provided by this act *for any lawful purpose* except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money.' The purpose for which a corporation is formed under the act must be a *lawful* purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois, it was not organized for a lawful purpose, and all acts done by it towards the accomplishment of such object are illegal and void.

"The word 'unlawful,' as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or, in other words, such acts, powers and contracts as are *ultra vires*. *Franklin Co. v. Lewiston Sav. Inst.* (1877), 68 Me. 43; *Oregon Ry. Co. v. Oregonian Ry. Co.* (1888), 130 U. S. 1.

"The business of manufacturing and distributing illuminating gas by means of pipes laid in the streets of a city is a business of a public character; it is the exercise of a franchise

belonging to the state; the services rendered and to be rendered for such a grant are of a public nature; companies engaged in such business owe a duty to the public; any unreasonable restraint upon the performance of such duty is prejudicial to the public interest and in contravention of public policy." Citing *Chicago Gas Light Co. v. People's Gas Light Co.* (1887), 121 Ill. 530, 18 N. E. R. 169; *Gibbs v. Baltimore Gas Co.* (1888), 130 U. S. 396.

¹ "We are reminded by counsel that the application by the courts of public policy to the law is a usurpation of legislative functions. And undoubtedly some courts have gone so far as to deserve the charge of such usurpation. But it is the duty of the judiciary to refuse to sustain that which is against the public policy of the state, when such public policy is manifested by the legislation or fundamental law of the state. *Santa Clara Female Academy v. Sullivan* (1886), 116 Ill. 375, 6 N. E. R. 183. By chapter 28 of our Revised Statutes it is provided that 'the common law of England so far as the same is applicable and of a general nature . . . shall be the rule of decision and shall be considered of full force until repealed by legislative authority.' Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. This principle owes its existence to the very sources from which the common law is supplied. *Greenhood on Public Policy*, pp. 2 and 3.

"The common law will not permit

7. Where a corporation is organized under general statute, a provision in the declaration of its corporate purposes, the necessary effect of which is the creation of a monopoly, will also be void.

8. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the state, but is in contravention of the spirit, if not the letter, of the constitution.

§ 616. **Cotton-seed oil combination.**¹—Four corporations engaged in the manufacture of cotton-seed oil in Memphis entered into an agreement for the formation of what was designated as a “Combination Syndicate” and “Partnership.” The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents and employees selected by them, for the common benefit; the profits and losses of such corporations to be shared in proportions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years, and was, as a matter of fact, at the end of the first year, renewed for two more years.

The possession of the mills was turned over to the executive committee, and they were operated by these managers thenceforward under the name of the “Independent Cotton-seed As-

individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public. *Chappel v. Brockway* (1839), 21 Wend. 158; *West Virginia Transportation Co. v. Pipe Line Co.* (1883), 22 W. Va. 600. In *Stanton v. Allen* (1848), 5 Denio, 434, an agreement whose tendency was to prevent competition was held to be void by the principles of the common law, because it was against public policy and injurious to the interests of the state.

“‘Contracts creating monopolies are null and void as being contrary to public policy.’ 2 Addison on Cont.,

743. All grants creating monopolies are made void by the common law. 7 Bacon’s Abridgment, p. 22. In the *Case of the Monopolies*, 11 Coke, 84, b, it was decided as long ago as the forty-fourth year of the reign of Queen Elizabeth, that a ‘grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly and against the common law. 2. That it is against divers acts of parliament,’ etc. *Bell v. Leggett* (1852), 7 N. Y. 176; *Trist v. Childs* (1874), 21 Wall. 441.”

¹*Mallory v. Hanaur Oil Works* (1888), 86 Tenn. 598, 8 S. W. R. 396.

sociation.” There was a provision in the contract by which other mills were to be admitted by consent, and a fifth corporation was in fact subsequently admitted. The Hanaur Oil Works was one of these contracting corporations, the contract being authorized by both shareholders and directors. In 1886; the business of the second year having been about concluded, the board of directors of the Hanaur Oil Works passed a resolution declaring this contract void, as being an agreement *ultra vires*, and their president was instructed to take possession of their mill. There was some proof tending to show that, upon demand of the president of the defendant in error, the general superintendent of the “Independent Cotton-seed Association” surrendered possession of the Hanaur mill to him, and agreed to hold for him, and that he afterward repudiated this agreement by surrendering possession to one of the executive committee, who thereupon locked up the mill, and gave instructions to a watchman in the employ of the committee not to admit the Hanaur officers.

An action of unlawful detainer was begun by the Hanaur Company to regain possession of its property. Judgment was rendered in favor of the plaintiff, and upon appeal the supreme court of Tennessee held that the contract between Hanaur and the other four corporations was a contract of partnership between corporations, which, under its charter, the Hanaur Oil Works had no power to make, and it was therefore void.¹

¹ The court said: “A careful examination of this agreement discloses every material element of a contract of partnership. The absolute ownership of the corporate property, the mills, machinery, etc., is not conveyed to the partnership, nor is this necessary. The beneficial use of all such property is surrendered to the common purpose. The provisions for the complete possession, control and use of the properties of the several corporations by the partnership or syndicate is perfect. Nothing is left to the several corporations but the right to receive a share of the profits and participate in the management and control of the consolidated interests as one of the new association.

The contract is, both technically and in its essential character, a partnership in so far as it is possible for corporations to form such an association.

“It is, however, argued by the learned counsel for appellants that if it be a partnership that it does not, therefore, follow that it is *ultra vires*; that such a contract, not being prohibited by law, or the charter of the defendant in error, or against public policy, is not void, even if in excess of power expressly conferred; that the business proposed by the contract, being within the purpose of the charter, is therefore within the implied power of the corporation, and not *ultra vires*. In other words,

"If a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts. The whole policy of the law creating and regulating corporations looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken from its stockholders and the authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts. The decided weight of authority is that a corporation has not the power to enter a partnership, either with other corporations or with individuals."¹

'that the question is not whether the corporation had, by virtue of the act of incorporation, authority to make the contract, but whether they are by those statutes *forbidden* to do it.' In this doctrine we do not concur. There is, however, respectable authority for the position. A corporation, being an artificial creation, is the very thing it is made by the statute which brings it into being, and nothing more. The extent of its powers are those enumerated in its charter, or implied by fair and natural construction of powers expressly conferred.

"The charter is the measure of its powers, and the enumeration thereof implies the exclusion of all others. We are not to look to the charter to see whether the thing done be prohibited, but whether there is authority to do it. These principles we understand to have the support of the great weight of authority in this country, and to have the sanction of the supreme court of the United States." Citing *Thomas v. Railroad Co.* (1879), 101 U. S. 71.

¹ In an interesting article in the

Political Science Quarterly (vol. 3, p. 609), Theodore W. Dwight discusses the law of trusts, and vigorously defends the right of the stockholders of a corporation to organize a trust. In the course of the article he says:

"One general fact, running through the trusts against which an outcry has recently been made, is that the producers of certain commodities are corporations, having power by law to have a subscribed capital in shares and to issue transferable certificates of stock to the subscribers. This course having been taken by the corporations respectively, the *subscribers* or stockholders of a number of such corporations enter into an agreement between themselves, whereby, among other things, they transfer to a committee their certificates of corporate shares. This committee take out from each corporation new certificates of shares in their own names, and thereupon issue in return to the old stockholders certificates of *their own* and not of the corporation. The result of this is that the committee become

the stockholders on the corporate books and have the same power of control as the stockholders would have had if they had retained their position as stockholders. This course of action, if it had been taken to effectuate a transfer of ownership as the result of a sale, would have been one of the ordinary transactions connected with the transfer of stock, except that no certificate would have been issued by the new to the former owner. The reason for the difference is that in the so-called 'trust' the stockholder does not intend, in making the transfer to the committee, to part with his ownership, but rather to confer a power of control for the stockholder's ultimate benefit. It would be impossible to persuade any stockholder in his right mind to take such a course unless he supposed that it would be likely to be beneficial to himself. And if the main body of stockholders concur it must be assumed to be in their view for the general benefit. Nothing is more certain than the proposition that every stockholder has a right in law to put his stock in this way in the name of a trustee, provided that the *purpose* be lawful. There is nothing in law to prevent each stockholder from selecting the same trustee or trustees, and designating the same purpose. There is nothing in the existing law of personal property requiring the purpose (which is technically called a 'declaration of trust') to be in writing, though there is such a rule as to trusts in real estate. Still, it may as to personal property be put in writing, and prudence would require that it should be. Accordingly, it is reasonable to suppose that, in such great transactions as are now under consideration, the stockholders will not surrender their certificates to the committee without a written agreement defining the powers of

such committee and the purposes for which the transfer is made. Such an agreement 'declares' the trust. It thus appears that a trust is in itself a colorless thing. It is a legal contrivance in daily use. It has in itself no element of good or bad. It is the purpose, if anything, which gives it the stamp of illegality.

"We are thus led to the conclusion that we have before us the very problem that we would have if individuals, not stockholders or members of incorporated companies, were doing the acts in question, and all the questions that have already been discussed become pertinent to the present inquiry. It may, however, properly be pointed out, for the sake of insuring still greater clearness, that the corporations in which the shareholders have stock are not parties in any form whatever to the trust as between the stockholders and the committee. The stockholders cannot in law be confounded with the corporations. The latter still remain in existence. The agreements between the stockholders may be modified or abrogated. The corporations in each case are untouched. They may carry on their business as before, earn profits, or remain idle and earn none. Whatever moral force the agreement of the stockholders may have upon the corporation, it has no direct legal effect. If the corporate directors should refuse to pay attention to the wishes of the stockholders, nothing could be accomplished by the latter until at the annual election they proceeded to choose more complaisant directors.

"The next inquiry is: If it be conceded that 'trusts' are lawful, being legitimate modes whereby producers may regulate prices, would preventive legislation be valid, or would it be opposed to the constitutional rule that a person is 'not to be deprived of life, liberty or property without

due process of law?' This clause appears both in state constitutions and in the United States constitution. The word 'liberty,' as here used, has been construed by the highest state authority to include 'the right of a person to adopt such lawful industrial pursuit, not injurious to the community, as he may see fit.' It includes the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. *People v. Gillson*, 109 N. Y. 389, 398 (1888), 17 N. E. R. 343, with many cases cited on p. 399. It is judicially declared that a liberty to adopt or follow lawful industrial pursuits in any manner not injurious to the community is not to be infringed upon, limited, weakened or destroyed by legislation. For such restrictive or destructive legislation good reasons must be given, based upon some ground affecting the public welfare. Such reasons are given for restrictions upon the sale of intoxicating liquors, for regulations conducive to the public health, or other matters embraced within the elastic term 'police power.' But the line must be drawn somewhere, and the proper place to draw it is where the right to produce or to trade is restricted without any public advantage. A law cannot be justified simply by citing its own terms. An act does not become a nuisance by declaring it to be so. The objectionable element must exist as a matter of fact before the law is enacted to suppress it, and it must be sufficient to justify the law. Recent instances are an act prohibiting a seller from connecting with the sale of goods a gift of some advertised present, the object of the seller being to stimulate sales. *People v. Gillson* (1888), 109 N. Y. 389, 17 N. E. R. 343. Another instance is a law prohibiting the

manufacture of cigars and the preparation of tobacco in any form in tenement houses. *Matter of Jacobs* (1885), 98 N. Y. 98. These and other cases show that in determining as to what is a proper exercise of the police power, an act of the legislature is not final or conclusive, but is subject to the scrutiny of the courts.

"The application of these authorities to the case in hand is obvious. If a 'trust' entered into by a number of producers is now lawful as a reasonable and proper element in production, it cannot properly be made unlawful by legislative acts of a stigmatizing character. To produce freely as individuals; to associate and act in concert with others; to stimulate production when there is a scarcity of commodities; to regulate it and restrain it when there is a glut,—these things, whether they be done by individuals or by combined action, are prime elements in 'liberty' of trade. They are also constitutional rights, and, when used with a due regard to the rights of others, are beyond the reach of hostile or repressive legislation. Though corporate charters should be arbitrarily repealed, in some form the liberty of association would survive to producers. . . .

"It would almost seem, when great trade questions like this of trusts begin to agitate the public mind, that statesmen stand in awe over the probable effects of the mighty power that they and their predecessors have done so much to create. We in the United States have certainly not been outstripped by any men of any nation in removing the shackles imposed by men of former days upon domestic trade and internal commerce. At the very birth of the nation we established in our domestic trade perfect freedom throughout the country. Ever since that time we have been developing domestic

commerce on the lines indicated by our earliest statesmen. We have bridged mighty rivers, tunneled broad mountains, traversed vast deserts, extended all forms of communication till the whole country, with all its varying local institutions and diverse economic interests, is for trade purposes a single state. Commerce and trade have overleaped state lines and have become national. Unrestrained power of production has been followed by an equally beneficial liberty of association. The increase and growth of corporate power has been truly marvelous. The old notion of a corporate charter being a distinct gift of sovereign power, to be doled out to subjects with a sparing hand, has been practically abandoned. Corporate charters having a semblance of public benefit are granted for the asking. Ceasing to be mere privileges, they are looked on by business men as the machinery of trade and commerce, and in that aspect a matter of right. But where a partnership or an unincorporated association will serve their purposes better than an incorporated company, they cannot see why they should not freely resort to machinery of that kind. They know well that without profit production will cease. Capital will then hide itself or be transferred to more enlightened countries where freedom of internal trade means the removal of all useless clogs upon production. Forty years of legislative experience have taught the people of England that there is nothing to fear from

combinations of producers when competition is absolutely free, and that no 'conspiracy against the world' is possible.

"Let us therefore be calm. 'Trusts,' as a rule, are not dangerous. They cannot overcome the law of demand and supply nor the resistless power of unlimited competition. They are, however, a sign of the times. The right of association is the child of freedom of trade. It is too late to banish it. As mercantile concerns under freedom of trade have tended in our cities to be more and more vast and comprehensive and absorb the smaller ones, so it is reasonable to suppose that the right of association will be made more and more available in manufacturing. In fact the two tendencies are in substance the same. If association is prevented by law, different manufactories may be melted into one. The only way out of the difficulty, if it be one, is to invade the right of property, limit production by law, cut down the employment of large capitals, and perhaps, in the end, hand over production to the state.

"Are we ready for these things? All English-speaking people, we of the United States and the English of England, have been engaged for a hundred years both in overcoming natural obstacles to internal trade and in abrogating absurdly restrictive laws. It is not to be credited that we shall commit the supreme folly of resorting to mischievous legislation, fully tried and long since abandoned."

CHAPTER 17.

CORPORATE COMBINATIONS.

- §§ 617-619. The evolution of the corporate combination.
- 620-623. Some general propositions.
- 624. Corporate combinations permitted by statute.
- 625-628. Cases of corporate combinations—Combination of match companies.
- 629, 630. Combination of makers of capsules.
- 631, 632. Combination of biscuit companies.
- 633-637. Combination of makers of spring-tooth harrows.
- 638. Combination of manufacturers of woodenware.
- 639-641. Combination of distilleries.
- 642. Resuscitation of the distillery combination.
- 643-646. Combination of white lead manufacturers.
- 647, 648. Combination of manufacturers of glucose.

§ 617. The evolution of the corporate combination.—The corporate combination is the logical outcome of the decisions against simple combinations and trusts. It must not be supposed, however, that the corporate combination is of recent origin. Every corporation is a combination of individuals, or of combinations of individuals. From the very beginning of corporate organization corporations have been formed for the express purpose of uniting in one body for a common purpose individuals, firms and corporations, and from the very beginning corporations have enlarged their spheres of activity by purchasing and absorbing the business, assets and good-will of individuals, partnerships and other corporations.

The phrase “corporate combination” is used to designate the large corporations which have been organized, principally within the past few years, for the express purpose of consolidating competing firms and corporations in one organization. The distinguishing feature between the corporate combination of the present day and the corporation which, in process of time and as incidental to its growth, acquires a large number of competing plants, lies in the fact that the corporate combination is incorporated for the express purpose of acquiring the possession and control of competing plants, whereas to the cor-

poration that, with the development of its business and in the course of time, acquires the same possession and control of competing plants, such acquisition is incidental to the development of its business and not the prime object of its creation. In other words, the practical result, so far as the control of any particular industry is concerned, may be essentially the same, but in one case the result is attained as a matter of growth and natural development, while in the other case — in the case of corporate combinations — the result is attained at one step, and the combination of the several plants is the sole object in view.

§ 618. The courts having condemned simple combinations and the trust form of combination as contrary to public policy, the corporate form naturally suggested itself as a possible escape from the force and effect of the many decisions adverse to the other forms. It was argued that while the courts might deny the right of individuals, firms or corporations to meet together and form associations, pools or agreements with the intent to control prices and outputs, no court would deny the right of an individual, or of a partnership, or of a corporation to purchase outright the assets, business and good-will of any individual, firm or corporation engaged in the same line of trade or manufacture. The court of appeals of New York, in the celebrated *North River Sugar Refining Co. Case*,¹ said in this connection: "It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group, at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine and mass their fortunes in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly ex-

¹(1890) 121 N. Y. 582, 24 N. E. R. 834.

ceeding in number and strength and in their power over industry any possibilities of individual ownership; and the state, by the creation of the artificial persons constituting the elements of the combination and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause, of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing; what it should cause and create is quite another."

These observations are quite aside from the legality or illegality of a combination. Whether or not the state should place limitations upon the power and magnitude of corporations is a matter entirely distinct from the question whether or not any given corporation or combination is or is not legal. So long as the state sanctions the creation of corporations without limitations as to power and capital, then it would seem to follow that within their chartered rights corporations have the same power to acquire property as has an individual.

It may be assumed that in the long run neither courts nor legislatures will attempt to curtail in the slightest degree the rights of either individuals or partnerships to acquire, own and control properties and plants. Any interference with or curtailment of these rights would amount to a positive restriction of that liberty which is guaranteed by free institutions.

§ 619. As regards the rights of corporations they are a matter of legislative grant. While constitutional limitations prevent legislatures from depriving corporations already in existence of valuable rights, it is quite within the power of each legislature to lay down the terms upon which corporations may be created. The legislature may dictate the powers that corporations shall be permitted to exercise, the amounts at which they shall be capitalized, and whether or not they shall be permitted to consolidate with other corporations, or in any manner co-operate with or control other corporations. But unless these various conditions and limitations are specified in advance of the creation of the corporation, the legislature in a very large measure loses its power to afterwards make restrictions and limitations; and a corporation organized under a law which contains no provisions directly or indirectly restricting the

power of the corporation to acquire, own and control such properties and plants as it sees fit, in connection with the objects for which it is created, has power in these respects like unto the power of an individual or a partnership.

§ 620. Some general propositions.—The following general propositions are relied upon as sustaining the validity of the corporate form of combination:

1. The right of an individual to acquire by purchase or lease, and to own and control as many properties and plants in any trade or manufacture as he desires, is limited only by the resources of the individual.

2. The right of any partnership to acquire by purchase or lease, and to own and control as many properties and plants in any trade or manufacture as it desires, is limited only by the articles and of the partnership and its resources.

3. The right of a corporation to acquire by purchase or lease, and to own and control as many properties and plants in any trade or manufacture as it desires, is limited only by its resources, its charter, the law governing its incorporation, and whatever limitations there may be in the law of the state applicable to corporations generally.

Beyond the limitations above noted there are no limitations of a vague and uncertain character, such as considerations of public policy, which restrict the right of the individual, or the partnership, or the corporation, to acquire by lease or purchase the control of plants and properties.

However, to the general propositions above laid down should be added the following:

4. No form of organization recognized by law can be used as a cloak for a conspiracy; and wherever it is charged that an unlawful combination exists, courts will probe beneath the surface—the mere form of the organization, whether it be a partnership or a corporation—to ascertain the real objects and purposes of the parties to the combination.

This last proposition is in no sense a limitation of the first three; the right of a partnership or a corporation to acquire by purchase or lease and to own and control as many properties and plants engaged in any trade or manufacture as it desires may be conceded without affecting the validity of the proposition that the objects and purposes of the parties en-

gaged in effecting a combination are always subject to investigation, and if it should appear that they are attempting to do that which is unlawful or oppressive the courts will disregard the form adopted and treat the combination as a conspiracy.

§ 621. The mere size of the combination is immaterial. Whether a corporation be capitalized at a small amount or a large amount is as immaterial as is the wealth of an individual or the resources of a partnership. The extent of the resources is not evidence of either wrong doing or right doing. The association of two insignificant individuals commanding no capital and no resources may be an unlawful combination, whereas a partnership, or a corporation, having millions at its command may be an entirely lawful combination. It is so easy to obscure right notions by the use of sounding phrases, such as "gigantic aggregation," "enormous combinations," "vast aggregations of capital," "huge monopolies," etc.,—many such phrases might be culled from decisions in this connection,—that it would be a wise rule to rigidly exclude all such terms from the discussion of the subject, for they mean nothing and lead to nothing except erroneous conclusions. The legality of a combination is not determined by the use of epithets; it is a matter for sober and serious investigation; it is a question of fact to be determined by weighing a mass of evidence; it is not a matter that can be successfully disposed of by rhetoric.

Keeping clearly in mind that the only distinguishing feature between a corporate combination and the corporation as it is ordinarily organized and developed is the fact that the corporate combination is a corporation organized for the express purpose of bringing together certain plants and properties, whereas the corporation, as ordinarily organized and developed, is organized primarily for the purpose of conducting business in accordance with its charter, and acquires other plants and properties only as incidental to the development of its own business, the question naturally arises, What advantages before the law has the corporate combination over the simple combination?

That the corporate form of combination has many advantages from a practical point of view is clearly apparent; but in so far as the corporate form of combination is adopted for

the purpose of evading the law against conspiracies, it is, or should be, ineffectual. So far as the law of conspiracy is concerned, it is quite immaterial what form the combination adopts. The embarrassment that the courts will experience in dealing with corporate combinations along lines laid down in the decisions against simple combinations, lies in the fact that many of the decisions against simple combinations are based upon no sound principles whatsoever, but are the result of sentiment and prejudice. Beyond question it will be found impossible to apply to corporate combinations many of the sweeping and drastic propositions that have been applied to simple combinations. Courts which have held associations, agreements and arrangements entered into for the protection and advancement of trade unlawful — not because they were conspiracies, not because they violated any recognized rule of law, but simply because they “tended” to create monopolies or stifle competition, or because they were contrary to more or less arbitrary or imaginary rules of public policy — will have great difficulty in dealing with corporate combinations along the same lines. It is one thing to arbitrarily hold that an association of individuals engaged in a particular trade is contrary to public policy, without assigning any other or better reason for holding the association illegal than those last suggested, and it is quite another and different thing to hold that a corporation which succeeds the same association and purchases the plants and properties of the same individuals, thereby accomplishing identically the same practical result so far as the control of trade and prices is concerned, is of such an illegal character that it must be dissolved. The right of individuals to form corporations and to sell to corporations their various plants and properties is too widely recognized and too common a practice to be questioned at this day.

It is none the less true, however, that the corporate form cannot be used to accomplish objects which are unlawful, and the court which dispassionately and consistently applies the same rules to all forms of combinations, and investigates without prejudice or favor the objects and purposes of every combination before it, will have no more difficulty in dealing with the corporate form of combination than with either the simple combination or the trust form.

§ 622. The third general proposition above laid down affords no protection whatsoever to the individual, the partnership or the corporation doing that which is unlawful or oppressive.

As has already been shown, the corporation, as ordinarily organized and developed, may at any time degenerate into a conspiracy—that is, its officers and stockholders or a controlling number of them may divert the powers and resources of the corporation from its lawful purposes to unlawful purposes; the moment this is done all who are parties to such a diversion of the corporate powers and resources are members of the conspiracy and individually liable for the consequences of their acts, and the corporation itself may be liable for the acts of its officers and stockholders. Men cannot shield themselves from the consequences of their wrong doing by operating under the guise of a corporation, nor will the resources of the corporation be preserved intact for the benefit of its members if those members are using the corporate form as a cloak for unlawful or oppressive acts.

It is equally clear that a combination which adopts the corporate form as a means to effect its purposes is liable for all damage occasioned by unlawful or oppressive acts, and the corporation organized as an instrument to effect the ends in view is equally liable. Were it otherwise the corporate form would constitute a convenient barrier against the claims of all who might be damaged, and its powers could be abused without redress.

That which individuals cannot lawfully do by simple combinations they cannot lawfully do by corporate combinations. This proposition seems too clear to require illustration, and yet the impression prevails very generally that by simply changing the form of the combination the decisions against simple combinations and trusts have been entirely evaded. In so far as the decisions against trusts were based upon the general principles governing corporations, the adoption of the corporate form of combination undoubtedly meets many of the objections urged against the trust form; but in so far as the decisions against trusts and simple combinations challenged the validity of combinations generally, the adoption of the corporate form is no evasion whatsoever. The right of any number of individuals to form a corporation and sell to the corporation, in

return for either cash or the capital stock of the corporation, their plants and properties, has nothing to do with the question whether or not the object of these individuals in forming the combination and in so disposing of their plants and properties is to do that which is unlawful or oppressive. If the purposes of the organization of a corporation and the transfer of the plants and properties is to do that which is unlawful or oppressive, then any party injured as a result of the conspiracy may ignore the existence of the corporation and proceed against the conspirators jointly or severally, or the party injured may proceed against the corporation as the effective instrument of the conspiracy.

§ 623. Nothing herein said, however, affects the right of an independent and innocent party to dispose of his plant, assets and good-will to a combination regardless of its character. In a case already referred to,¹ an independent manufacturer contracted to sell his entire product for a period of years to a certain corporation engaged in the same line of business, without any knowledge that the same buyer was making similar contracts for the purpose of securing the control of the trade in the article manufactured and to control prices. The suit was for certain annual instalments which the buyer failed to pay; and it was held that, even though it should appear that the buying company was engaged in the illegal effort to suppress competition and advance prices, an innocent party contracting for the sale of his product could enforce the contract and collect the instalments due. In order to deprive a party, having transactions with an illegal combination, of rights under his contract, it must clearly appear that he is acting in concert with the parties to the conspiracy, or with such knowledge of their illegal plans and purposes as to make him a participator therein, by entering into contracts which directly or indirectly further such plans and purposes.

§ 624. Corporate combinations permitted by statute.—As has already been noted, the law frequently permits and encourages consolidations of corporations, and the organization of corporations for the purpose of taking over the plants and properties of both individuals and corporations. For instance, in the Sugar Refineries Case the New York court of appeals

¹ Carter-Crume Co. v. Peurrung (1898), 86 Fed. R. 439.

said:¹ "It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust, or combination, or partnership, however it may be described, amounts only to a practical consolidation, which public policy does not forbid, because the statute permits it.² The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the state accomplished its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations, and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the state, owing duties and obligations to the state, and subject to the control and supervision of the state; and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions, and owing no corporate allegiance. Under the statute the consolidated, taking the place of the separate, corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not, as here, a capital stock double that value at the outset, and capable of an elastic and irresponsible increase. The difference is very great, and serves further to indicate the inherent illegality of the trust combination."

The reasoning of the court in the above paragraph is by no means satisfactory. The epithets "colossal," "gigantic," "irresponsible," "inherent illegality," are made to do heroic service as substitutes for logic;—as if the legality of a combination is at all affected by its "colossal" or "gigantic" size,—as well might the guilt of a thief be determined by weighing him. It would seem that, so far as the consuming and trading public are concerned, it would be quite immaterial whether a number of manufacturing plants are brought together in one corporation under the particular act above referred to, or whether the same plants are brought together by some form of voluntary association. It seems rather a violent assumption to say that

¹ (1890) 121 N. Y. 582, 24 N. E. R. 834.

² Laws of 1867, ch. 960; Laws of 1884, ch. 367.

the public policy of the state deems a voluntary association injurious, whereas it approves the same results if under a form sanctioned by law. So far as the North River Sugar Refining Company was concerned, there were, perhaps, sufficient reasons for ousting the company of its charter for violation of principles governing the law of corporations generally, without referring to the legality of the combination effected by the trust.

In any state wherein the legislature specifically sanctions the consolidation of corporations, and the organization of corporations with power to acquire and absorb the plants, properties and assets of other corporations, it is an inconsistent rule for courts to hold that the public policy of the state forbids consolidations and combinations of competing enterprises.

The legislature cannot make legal a combination which amounts to a conspiracy, or deprive a party of redress for damages suffered as the result of the operation of a conspiracy. The form of a combination authorized by law may be legal because specifically sanctioned by legislative enactment, but the various parties to the combination may still be guilty of a conspiracy to do that which is unlawful or oppressive.

§ 625. Cases of corporate combinations — Combination of match companies.¹— The Diamond Match Company was organized in 1880 under the laws of the state of Connecticut, for the purpose of uniting, if possible, in one corporation, the match manufacturies of the United States. The Richardson Match Company of Detroit transferred its property to the Diamond Match Company, receiving therefor \$190,000 in the common stock of the Diamond Match Company, and \$95,000 in preferred stock, a portion of the preferred stock being paid for in cash. At the same time the Richardson Company executed a bond to the following effect: “And the Richardson Match Company hereby covenant and agree to and with the said the Diamond Match Company, that it shall not and will not at any time or times, within twenty years from the date hereof, directly or indirectly engage in the manufacture or sale of friction matches, and that it will not aid, assist or encourage any one else in said business, in the state of Michigan or anywhere else, where its doing so may conflict with the business and interests, or diminish the sales or lessen the profits, of the Diamond Match Com-

¹ Richardson v. Buhl et al. (1889), 77 Mich. 632, 43 N. W. R. 1102.

pany; and it is understood by it that the above covenant not to engage in the match business is a valuable and influencing consideration, without which the Diamond Match Company would not have purchased the above property; and for the true and faithful performance of said covenant it hereby binds itself, its successors and assigns, heirs, executors and administrators, unto the said the Diamond Match Company in the sum of fifty thousand dollars, to be recovered and paid as and for liquidated damages."

There were but three parties interested in the Richardson Company, and in order to effect the transfer a certain agreement was entered into which provided for certain payments among themselves under contingencies that might arise in the future. Some two years after the transfer had been made to the Diamond Match Company, these three individuals not agreeing as to the true intent and purpose of the agreement they had signed, one filed a bill in chancery against his two associates for an accounting. The only question presented to the court by counsel was the construction of the contract the three had signed. It seems from the opinion of the case that the supreme court during the argument must have called the attention of counsel to the question of the legality of the combination which the supreme court considered involved, but that feature of the case was allowed to pass without discussion. The court, however, in its decision, ignores all questions except that, saying in one portion of one of the opinions: "It appears from the testimony that the Diamond Match Company was organized for the purpose of controlling the manufacture and trade in matches in the United States and Canada. The object was to get all the manufacturers of matches in the United States to enter into a combination and agreement by which the manufacture and output of all the match factories should be controlled by the Diamond Match Company. Those manufacturers who would not enter into the scheme were to be bought out; those who proposed to engage in the business were to be bought off, and a strict watch was to be exercised to discover any person who proposed to engage in such business, that he might be prevented if possible. All who entered into the combination, and all who were bought off, were required to enter into bonds to the Diamond Match Company that they

would not, directly or indirectly, engage in the manufacture or sale of friction matches, nor aid nor assist nor encourage any one else in said business, where, by doing so, it might conflict with the business interests, or diminish the sales, or lessen the profits, of the Diamond Match Company. These restrictions varied in individual cases, as to the time it was to continue, from ten to twenty years. Thirty-one manufacturers, being substantially all the factories where matches were made in the United States, either went into the combination or were purchased by the Diamond Match Company, and out of this number all were closed except about thirteen."

§ 626. The charter of the Diamond Match Company stated that the business of the company was "to manufacture, buy, sell and deal in friction matches of all kinds, and all articles entering into the composition and manufacture thereof; to manufacture, buy, sell and deal in machines and machinery, whether applicable to the manufacture of friction matches or to other purposes; to purchase, own and sell exclusive rights under letters patent relating to the manufacture of friction matches, and to machines and machinery, whether applicable to the manufacture of friction matches or to other purposes; to manufacture, buy, sell and deal in animal pokes, tobacco, pipes, curry-combs, brushes, shoe-blackening and shoe-dressing, and all articles entering into the composition and manufacture thereof; to purchase, own and sell exclusive rights under letters patent relating to the manufacture of all the articles herein enumerated, and to machines and machinery applicable to the manufacture thereof; to buy, sell, own and deal in any real or personal property necessary or convenient to the prosecution of said business, and generally to do all things incidental to said business and the proper management thereof."

From this provision it is apparent that the object of the organization was primarily to manufacture and deal in certain articles, and to buy and own such real and personal property as was necessary or convenient in the prosecution of its business. There is nothing in the charter conferring upon the company the right to acquire the control of other corporations for the purpose of controlling competition and prices, and of holding other plants and properties, not for the purpose of using them actively for purposes of manufacture, but for the purpose

of maintaining them in idleness in order to control the trade. The court referred to the following facts disclosed by the evidence: "The Diamond Match Company, in carrying out its purposes, found it necessary in many instances to buy a large quantity of useless material, and to pay large and exorbitant prices for the property purchased, which they could not make available; and in many cases in no other way was it possible to purchase the inactivity of manufacturers, and those who intended to enter into the business, and who would otherwise become competitors of the company in the trade. For the purpose of showing upon the books of the company the amount it was obliged to pay for unnecessary and useless property, and the excess in prices for the property they could use, and to silence and prevent all competition,—the company opened two accounts,—one headed 'Real Estate and Machinery,' and the other 'Purchase Account.' The capital stock of the company consisted of \$2,500,000, divided into \$1,400,000 of common stock and \$850,000 of preferred stock. For five years the preferred stock was entitled to an annual dividend of ten per cent. before any dividend was to be paid on the common stock. All corporations and individuals in the country, engaged in the business of making friction matches, desiring or consenting to transfer their property to the Diamond Match Company, did so upon valuations agreed upon, and received their pay therefor in the stock of the Diamond Match Company at par, and gave a bond to the company of the tenor and effect of that given by the Richardson Match Company when it entered the company. . . . Each proprietor subscribed for a certain amount of preferred stock which he paid for by transferring to the company such matches and match materials as he or it had on hand when they entered the company, at an appraised value, and if this was insufficient to pay for such stock the balance was paid in cash; but common stock was paid for all real estate, machinery, patents, good-will, bonds to stay out of the business, and all other property transferred to the company at the valuation agreed upon when the proprietor or proprietors came into the company, except matches and match materials, for which preferred stock was issued. Under the arrangement by which any party sold and conveyed a match factory or other property to the company, he was to buy at its par value

one-half as much preferred stock as he had received in common stock for his property. This was intended as the working capital for the new company, and every person who conveyed property to the company was obliged to give to the company a bond, such as is hereinbefore mentioned. Under the policy above stated, through the energy of its officers and managers, the Diamond Match Company succeeded in securing control substantially of all the factories in the country, with their several properties, and the owners thereof were brought under its dictation and the great monopoly became complete, and, as was expected by its proprietors, the gains realized by the company were enormous.”¹

§ 627. In holding the particular contract involved void as against public policy, the supreme court of Michigan, by Sherwood, J., said: “I think no one can read the contract in question and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Company. This object is openly and boldly avowed. Not only does this appear

¹ Regarding the issues in the case the court said: “No question is raised as to the validity of the contract between the parties, or upon its invalidity upon the ground of public policy, or for any other cause. It is treated by the parties on both sides as a valid instrument, to be construed and enforced by the court as such, and no unwillingness is expressed by either side to abide the correct construction when ascertained; but it is claimed by complainant that, if the construction is to be given to it contended for by defendants’ counsel, equity and good conscience will have been violated to an extent requiring the exercise of the restraining power of a court of chancery to prevent the injury and wrong, not intended by the defendants when the instrument was made, and which at that time was entirely unanticipated by complainant. But it must be recollected that the object to be accomplished

by the reorganization of the enterprise was by all the parties the same; that the means to be resorted to in the accomplishment of the object desired, if successful, had no respect for the equitable or first right of any person under other and different circumstances, and that the complainant as well as the defendants were active participants in the business of the company and its proceeds, seeking the accomplishment of the same object, and participated largely in adopting the means to be employed for that purpose; and if such object or means were reprehensible or inequitable, all the parties, the complainant as well as the defendants, are ‘under the same condemnation,’ and a court of equity will leave the parties, when such is the case, where it finds them, outside the rules of courts of justice, ‘*in pari delicto*,’ and they must settle their own grievances and unlawful transactions.”

in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of Gen. Alger himself avers it and settles its character beyond question. The organization is a manufacturing company. The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business and the manner of carrying it on. The sole object of the corporation is to take money by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over sixty millions of people. The article thus completely under their control for the last fifty years has come to be regarded as one of necessity not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes and in carrying out its object that the contract in this case was made between these parties, and which we are now asked to aid in enforcing. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provision in several of our state constitutions. Indeed, it is doubtful if free government can long

exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies and intolerable, and ought to receive the condemnation of all courts. In my judgment not only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy. The decree at the circuit should be reversed and the complainant's bill dismissed, with costs."¹

¹ In a concurring opinion Champ-
lin, J., said: "There is no doubt that
all the parties to this suit were active
participants in perfecting the com-
bination called 'The Diamond Match
Company,' and that the present dis-
pute grows out of that transaction,
and is the fruit of the scheme by
which all competition in the manu-
facture of matches was stifled, oppo-
sition in the business crushed, and
the whole business of the country in
that line engrossed by the Diamond
Match Company. Such a vast com-
bination as has been entered into
under the above name is a menace to
the public. Its object and direct
tendency is to prevent free and fair
competition, and control prices
throughout the national domain. It
is no answer to say that this monop-

oly has in fact reduced the price of
friction matches. That policy may
have been necessary to crush compe-
tition. The fact exists that it rests
in the discretion of this company at
any time to raise the price to an ex-
orbitant degree. Such combinations
have frequently been condemned by
courts as unlawful and against pub-
lic policy." Citing *Hooker & Wood-
ward v. Vandewater* (1847), 4 Denio,
349; *Stanton v. Allen* (1848), 5 Denio,
484; *Morris Run Coal Co. v. Barclay
Coal Co.* (1871), 68 Pa. St. 173; *Central
Salt Co. v. Guthrie* (1879), 35
Ohio St. 666; *Craft v. McConoughy*
(1875), 79 Ill. 346; *Hoffman v. Brooks*
(1884), 11 Wkly. Cin. Law Bul. 258;
Hannah v. Fife (1873), 27 Mich. 172;
Alger v. Thacher (1837), 19 Pick. 51.
"It is also well settled that, if a con-

§ 628. It is interesting to note that this important case was disposed of upon questions not raised or discussed by counsel. It is also interesting to note that in neither of the opinions rendered by members of the court is there any mention of the point that the charter of the Diamond Match Company of Connecticut does not permit the company to acquire plants and properties for the purpose of closing the same.

The case turns upon a number of propositions of a character so sweeping as to amount to practically glittering generalities.

It is interesting to compare this with a decision in the court of appeals of New York in *Diamond Match Co. v. Roeber*,¹ wherein a certain manufacturer of matches sold out his plant and entered into a bond not to engage in the manufacture or sale of friction matches for a period of ninety-nine years within any of the states or territories of the United States or the District of Columbia, excepting the state of Nevada and the territory of Montana. The contract as was enforced is not in unreasonable restraint of trade under all the circumstances. The only point discussed is whether the contract was in restraint of trade. The court did not discuss the legality of the combination.

§ 629. Combination of makers of capsules.²—In 1893 certain manufacturers, corporations and parties engaged in the manufacture of capsules entered into a contract to pool their interests and form a corporation under the laws of the state of New Jersey, under the name of the United States Capsule Company; the capital stock was to be \$70,000, and the division of that capital stock among the parties to the agreement was fixed by the agreement. The parties agreed to convey to

tract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foote & Stone v. Emerson* (1838), 10 Vt. 344; and see *Hanson v. Power* (1839), 8 Dana, 91; *Pratt v. Adams* (1839), 7 Paige, 615; *Piatt v. Oliver* (1837), 1 McLean, 295, (1890) 2 McLean, 267; *Stanton v. Allen* (1848), 5 Denio, 434. It is not necessary that the parties, or either of them, should rely upon the fact that the contract

is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves."

¹(1887) 106 N. Y. 473, 18 N. E. R. 419.

²*Merz Capsule Co. v. United States Capsule Co. et al.* (1895), 67 Fed. R. 414.

the corporation their respective plants, together with the machinery, appliances, patents and good-will, and to receive therefor from the New Jersey corporation mortgage bonds to the amount of the appraised value of the property thus conveyed.¹

The agreement also provided: "Each of the parties hereto agree, from the date hereof, not to make, sign or accept any contract whatsoever for the future sale or delivery of any hard, empty capsules, or any other contract whatsoever, except ordinary contracts for immediate sale and delivery. All old, existing contracts with drug jobbers are to be completed by the new company, provided such are not for over fifty gross of capsules. It is also agreed that none of the parties hereto shall hereafter engage in the manufacture or sale of empty gelatine capsules in any manner whatsoever."

After the preliminary papers had been signed and the necessary steps taken for the organization of the New Jersey corporation, the stockholders of the Merz Capsule Company, a corporation organized under the laws of the state of Michigan, reconsidered their action and resolved to remain an independent company. The other parties to the combination endeavored to hold the Merz Company to its agreement, and endeav-

¹The agreement provided for the following method of valuing property to be conveyed: "The value of the property conveyed to said corporation by the respective parties shall be determined in the following manner: If all of the parties hereto are unable to agree upon the value of the property conveyed by each, the value of the real estate now owned by each party in Detroit shall be appraised by three disinterested and competent parties; one to be chosen by the National Capsule Company, and one by the other three parties, and the two so chosen to select a third. The decision of said appraisers, or the majority of them, to be final. The value of the real estate now owned by the National Capsule Company in Indianapolis to be appraised by three appraisers to be chosen in a similar manner, whose

decision, or that of a majority of them, is to be final. The machinery and appliances of every kind, including box-making machinery, to be appraised by three disinterested and competent appraisers at the price at which it can be duplicated in open market; and in estimating the value thereof only such machinery and appliances shall be considered as are practical in the manufacture of empty capsules, and now used by the parties hereto in the conduct of their business. The appraisers to be chosen as follows: The National Capsule Company to select an appraiser in Indianapolis, the other parties to select a competent expert machinist from a city outside of the two cities above named; the decision of such appraisers, or that of a majority of them, to be final."

ored to obtain possession of its plant, whereupon the Merz Company filed a bill in the circuit court of the United States for the western district of Michigan praying that the agreement between it and the other parties be declared null and void upon the ground that the combination was a conspiracy in restraint of trade among the several states, and was illegal under the act of congress of July, 1890. And further, that the agreement was contrary to the laws and public policy of the state of Michigan, in that it disposed of substantially the entire business plant of the Michigan corporation, in consideration for stock in a New Jersey corporation. In this connection the court said: "The general rule may be stated to be that it is incompetent for a corporation to subscribe for stock in another corporation. It must be acknowledged that there are exceptions to this rule, founded upon a variety of peculiar circumstances, which it is not necessary here to enumerate. I am unable to discover any ground upon which this case can be held within any of such exceptions. But, however this may be, if the corporation in which the stock is taken is a domestic one, and subject to the same laws and dominion as the one taking such stock, or where, if the corporations are organized in different states, they are subject to regulations of a substantially identical character, my opinion is that where, as in this case, the law of the corporation in which the stock is taken is of a substantially different character, and fails to impose the liabilities and create the obligations imposed by the law of the corporation subscribing for the stock, such subscription is *ultra vires* of the latter corporation, and is illegal and void. The laws of Michigan, under which the complainant is incorporated, impose restrictions, duties and obligations upon it of a character which indicate the purpose and policy of the laws of the state of Michigan in providing for its incorporation. I shall not go into details in respect to those provisions. They are sufficiently obvious upon an inspection of the statute. The general fact is sufficient for the present purpose. They are safeguards erected by the state, and constitute the bounds and conditions of corporate action. It is quite clear that the laws of New Jersey fail to make many of those conditions effectual or obligatory upon corporations organized thereunder, either in the original incorporation or in corporate ac-

tion; and it is clear that the statutory regulations, in that regard, of the state of New Jersey do not respond to what, by the laws of Michigan, is deemed essential. By the agreement in question the Michigan corporation conveys substantially its entire assets to the New Jersey corporation, abandons its business as a proprietor thereof, and becomes practically a mere employee of the New Jersey corporation, and subject to its dominion and control."

The court also held the agreement void as contrary to a certain act of the legislature of Michigan entitled: "An act declaring certain contracts, agreements, undertakings and combinations unlawful, and to provide punishment for those who shall enter into the same or do any act in performance thereof."¹

§ 630. The reasons assigned for holding the agreement invalid have no relation one to the other. Assuming for the moment that the agreement did not contemplate an illegal combination, it is difficult to see why a corporation doing business in Michigan should not be permitted to sell its entire plant, assets and good-will to any individual, partnership or corporation. If an individual had sought to purchase the assets and good-will of the Michigan corporation, and the corporation had entered into a contract to convey the same to an individual, such individual could have enforced the contract; if that same individual entered into a similar contract with a New Jersey corporation, or a corporation of any other state, to convey the assets, business and good-will which he had just purchased to the corporation, such corporation could enforce the contract. Whether or not the state of Michigan could forfeit the franchise of the Michigan corporation for abandonment and non-user, if the corporation disposed of its entire assets and went out of business,

¹ Act 225 of the Laws of 1889. See 3 How. Ann. St. 9354j. "It was strenuously argued before me by counsel for defendants that this statute is unconstitutional and void, in that it is class legislation. Whether or not this contention is well founded I do not now undertake to decide. It may be admitted that there is fair ground for doubt of the validity of this statute; but its invalidity is not so clear and free from doubt as that a court of first instance would, in my opinion, be justified in declaring it void. For the reasons thus briefly stated my conclusion is that the agreement upon which the defendants found their supposed rights was not authorized by the laws of Michigan, and is therefore void. It is unnecessary, therefore, to pass upon other grounds upon which the agreement is alleged to be invalid."

is quite another question, but there is nothing in the law of corporations which compels a private corporation to continue indefinitely in business.

The distinction which the court attempts to draw between the right of the Michigan corporation to sell to a New Jersey corporation, and its right to sell to another corporation organized under the laws of Michigan, will not stand the test of analysis.

If, however, the agreement provided for the organization of an unlawful combination, it was not only the right but the duty of any party to the agreement to withdraw as soon as the unlawful character of the combination was understood; and it is needless to say that no party or parties can compel another to remain in a combination of an unlawful character.¹

§ 631. Combination of biscuit companies.²—The American Biscuit and Manufacturing Company purchased the bakery business of a certain partnership and leased the premises, the vendors contracting to carry on the business for a certain time as agents of the American Company. After a time the vendors repudiated the contract, tendered back the stock of the American Company, and resumed business under the old name. The American Company filed a bill for an injunction and accounting, and a receiver.³

¹ Regarding the relief warranted by the facts disclosed the court said: "It remains to be considered what relief should be administered upon this state of things. The proof sufficiently shows—and, indeed, the nature of the transaction demonstrated this—that the complainant, on its own account, is not entitled to claim any relief founded upon the contract; but the contract itself being contrary to law furnishes no support for the aggressive attitude and conduct of the defendants. The complainant's conduct has been disingenuous, but I think it has the law of the case. The result is, as it seems to me, that the parties stand, in respect of their property rights, upon the same footing as if the contract had never been made; and upon the res-

toration by the complainant of what it has received, upon the footing of the contract, it would seem that the complainant is entitled to preventive relief, and that the defendants, or such of them as threaten to invade the property of the complainant, should be restrained from interfering therewith."

² American Biscuit & Manufacturing Co. v. Klotz (1891), 44 Fed. R. 721.

³ The facts in this case are detailed as follows in the opinion of the court: "This cause is submitted upon an application for a receiver. Some time in May last, the defendant Klotz, and Fitzpatrick, his partner, composing the firm of B. Klotz & Co., sold to the complainant their biscuit and confectionery manufactory for the price of \$259,000 and an

Regarding the nature of the organization, and the business done by the American Biscuit Company, the court said: "We are not satisfied that the complainant's business is legitimate. While the nominal purpose of the complainant's corporation, as stated in its charter, is the manufacture and sale of biscuit and confectionery, its real scope and purpose seems to be to combine and pool the large competing bakeries throughout the country into practically what is known and called a 'trust,' the effect of which is to partially, if not wholly, prevent competition, and enhance prices of necessary articles of food, and secure, if not a monopoly, a large control, of the supply and

assumption of the debts of B. Klotz & Co., amounting to \$42,000, which it was understood and agreed should be paid out of the income from the future business. The visible property was estimated to be of the value of \$101,000, and the good-will of the business to be of the value of \$200,000. The price was paid in stock of the complainant's corporation, estimated to be of value at par; that is, one hundred cents on the face value. The purchase was completed, price paid, property delivered, the factory and good-will transferred by Klotz & Co. to the complainant. Klotz leased his bakery premises to complainant for the term of years, and contracted in writing to become, and did become, the agent of the complainant, at a salary of \$—— per year. Klotz continued to carry on the business as agent for the complainant down to some time in November, when he repudiated the sale and the lease, erased the name of complainant from the bakery, as agent, transferred the policies of insurance from the complainant to himself, as an individual, then to B. Klotz & Co., and, for and in the name of the late firm, resumed the possession of all the property he had sold to the complainant, and the conduct of the business of the bakery and the confectionery establishment. He did this without resort to any legal pro-

ceedings. He thereafter held possession adversely to the complainant, and excluded it from the bakery. In this state of things, the complainant filed its bill for an injunction, and for an account and for a receiver against Klotz and W. A. Schall, who was alleged to be co-operating with him in the possession adverse to the complainant. Klotz has filed an answer, and he, together with his former partner, Fitzpatrick, who intervened by petition *pro interesse suo*, have filed a cross-bill asking a rescission of the entire transaction, *i. e.*, the sale and the lease, and tendering the stock which had been received by them as the consideration of the sale. Numerous exhibits and affidavits have been adduced by each party upon this hearing. The recital thus given shows that, in an order inverted from what would be expected, we have before us a cause in which a party who has sold and delivered a business to another, and become his agent, and, as such agent, was in possession of the property sold, sets up a possession adverse to his principal, asks for a cancellation of the sale, and the purchaser and principal asks that the agent shall account, shall be enjoined from asserting any claim hostile to his principal,—in a word, for a confirmation of its rights under the purchase."

prices in leading articles of breadstuffs. The case shows that an insignificant number of shares of complainant's stock was unconditionally subscribed for — apparently enough to qualify directors; but the great mass was taken and held by irresponsible parties, to be used in parceling out as full-paid stock to such leading and successful bakeries throughout the country as could be induced to come in on an agreed value of the property and a large estimate of good-will; each bakery, when secured, to be carried on by its former managers; subject, however, as to control of funds, territory, prices and competition, to the central management; all profits pooled, and of course division thereof to be made on the basis of the stock assigned to each bakery. Under this arrangement complainant has already secured the control and pooled the business of thirty-five of the leading bakeries in twelve different states of the west and south, and is evidently seeking more constituents.”¹

¹In discussing the federal act of 1890 and the use of the term “monopolies” therein, the court said: “In construing the federal and state statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word ‘monopolize’ cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the law-maker has used the word to mean ‘to aggregate’ or ‘concentrate’ in the hands of a few, practically, and as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word ‘pooling,’ which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression in each law, ‘combination in the form of trust,’ would seem to point to just what, in popular language, is meant by pooling. Now it is to be observed that these statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc.; and further, that the language is altogether silent as to what means must be used to constitute the offense. The offense is defined to ‘combine in the form of trust, or otherwise, in restraint of trade or commerce,’ and ‘to monopolize, or attempt to monopolize, any of the trade or commerce.’ To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense. One just and decisive test of the meaning of the expression ‘to monopolize’ is obtained by getting at the evil which the law-maker has endeavored to abolish and restrict. The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of a few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded

The court found that the American Biscuit and Manufacturing Company was engaged in an attempt to monopolize the biscuit industry, and further, that, even if its business was of a lawful character, it was not of such a meritorious kind that it should be encouraged by a court of equity. The relief prayed for not being a matter of strict right, but of judicial discretion, the court, in view of the nature of the business carried on by the complainant, could very justly refuse to intervene to grant the interlocutory relief desired. "Whatever we may feel compelled to do, on the final hearing of this cause, towards recognizing the complainant's legal rights, and compelling a faithless trustee to account, we are clear that at this preliminary stage, with our present impressions of the character and general scope of complainant's business, the court ought not, by the appointment of a receiver, to aid complainant to perfect, and perhaps to enlarge, his combination or trust; and the refusal to appoint a receiver can result in no serious and lasting injury to complainant, because the shares of stock of complainant company, forming the entire consideration of complainant's purchase, have been tendered in court, and may be impounded, to be held as security for any damages susceptible of proof resulting from the defendant's mismanagement of the property pending the suit."

§ 632. The case is of interest as indicating the risk run by any corporate combination when it leaves vendors in possession of property sold to the corporation. If a court finds that the corporate combination is of an unlawful character, it will decline to grant any relief as against any vendor in possession of property sold to the combination.

Even though a vendor has received the stock and securities of the combination, and is operating the plant in the interests of the combination, the courts will decline to interfere on behalf of the combination to compel the vendor to account or to

from the restrained or monopolized trade or commerce as absolutely as if kept out by law or force. If this is the meaning of the defining words, does not this corporation, thus glutted with the thirty-five industries of twelve states, disclose an 'attempt to monopolize?' So far, therefore, as the complainant's business is a combination in restraint of trade, or is an 'attempt to monopolize, or combine, in the form of a trust, any part of trade or commerce,' as these words are properly defined, the law stamps it as unlawful, and the courts should not encourage it."

relinquish possession of the property, since to do so would be in effect to compel the specific performance of an agreement the object of which was to form an illegal combination.

§ 633. Combination of makers of spring-tooth harrows.¹ — In 1890 about twenty firms and corporations were engaged in the manufacture of float spring-tooth harrows under various patents; litigation concerning alleged infringements had arisen among some of the firms and corporations. Several of these independent corporations organized the National Harrow Company under the laws of the state of New York with a capital stock of \$500,000. The purpose of the corporation as expressed in its certificate was the “conducting and carrying on of the manufacture and sale of float spring-tooth harrows and other agricultural implements.”

By certain agreements entered into by the manufacturers “it was agreed that they would assign the patents which they severally held to the National Harrow Company and receive therefor their value in stock; and in case the manufacturers should be unable to agree as to the value of their respective patents, it was provided that their value should be ascertained by three arbitrators, and that each manufacturer assigning patents should receive stock in the National Harrow Company equal in amount to the value placed on the patent by the arbitrators. Under this arrangement eighty-five patents were assigned to the National Harrow Company of New York, for which stock was issued to the assignors at the value appraised or at the value agreed on. By the contracts entered into between the manufacturers and the National Harrow Company it is apparent that this corporation was formed solely for the purpose of receiving assignments of the various patents under which the manufacturers were engaged in making harrows, and to grant licenses to the various manufacturers to continue to make the same kind of harrows they had previously made and to fix the price at which their harrows should be sold. By the terms of these contracts it appears conclusively that it was the purpose of the combination to restrict the right of the several manufacturers who should receive licenses to the manu-

¹ *Strait et al. v. National Harrow* (1896), 76 Fed. R. 667; *National Harrow Co. et al. (1891)*, 18 N. Y. Supp. 224; *row Co. v. Bement & Sons* (1897), 21 *National Harrow Co. v. Hinch et al.* App. Div. 290.

facture of the same kind of harrows which they had previously made."

The legality of the National Harrow Company was challenged in the three cases cited below.

§ 634. In one case¹ certain parties doing business in the state of New York engaged in the manufacture of spring-tooth harrows, and owning patents relating thereto, entered into a contract with the National Harrow Company transferring their business and patents to said company, and receiving in return therefor a certain amount of stock of the corporation, and accepting from the corporation certain licenses to continue the manufacture of the harrows. In this case the New York supreme court held that the Harrow Company was a combination to control the price and production of an implement necessary to agriculture, and therefore illegal, and that all contracts made in furtherance of such purpose were illegal and void.²

¹ *Strait et al. v. National Harrow Co.* (1891), 18 N. Y. Supp. 224.

² It appears from the evidence that for the purposes for which harrows are used the float spring-tooth harrow has practically monopolized the market. By reason of its superiority it has driven from the field nearly all of its competitors. It appears, further, that the defendant corporation has made contracts, similar to the one set forth in Exhibits A, B and C, with nineteen other firms and corporations, which, with the plaintiffs, comprised all of the manufacturers of float spring-tooth harrows in the year 1890 within the United States. By the contracts these manufacturers assumed to sell to the defendant corporation 'their business, the goodwill of the business, all patents now owned or which may hereafter be owned, all licenses and rights under patents relating to the manufacture and sale of float spring-tooth harrows.' They took back from the defendant corporation the exclusive right to manufacture the style of harrow they were manufacturing at the time of entering into such con-

tracts. The defendant's rights, therefore, under such contracts, are only to manufacture under patents which have been by the manufacturers discarded. The firm of G. R. Olin & Co. have assigned its patents to the defendant for cash value, without taking back such a license as is provided for in the other contracts. I do not understand that under the purchase from Olin & Co. the defendant gets the right to manufacture any harrow under any valuable patent to which it has not given the exclusive right to manufacture to other licensees. It was assumed and stated upon the trial that the incorporators and trustees of this National Harrow Company are all persons who are represented in the various manufacturing firms thus contracting with the defendant. It is apparent, therefore, that it is not one of its purposes itself to manufacture harrows for sale upon the market. It is claimed further that it has an ultimate object to manufacture materials for harrows for use by its licensees. But such an object is manifestly an incidental one only, if it

§ 635. In another case the National Harrow Company sought an injunction to restrain certain parties from selling harrows contrary to certain license contracts entered into between the

exist at all, and is evidently a purpose entertained to avoid the objection that the purchase by corporate licensees of stock in the defendant corporation is void, as beyond their corporate powers. The purposes of this incorporation are only important in this case as they bear upon the ends sought to be accomplished by these contracts. All manufacturers, then, of float spring-tooth harrows in the United States have agreed, by the papers executed, not to be directly or indirectly interested in the manufacture or sale of float spring-tooth harrows, or allow them to be manufactured or sold in any building controlled by them, or either of them, in the United States, or any territory thereof, except Montana, for fifty years, and except as agents and licensees of the National Harrow Company. They have transferred to the defendant company all the patents owned by them, or which may hereafter be owned by them. They have agreed that for fifty years they will not manufacture or sell any harrow except such as they are now manufacturing. By this contract, for fifty years they are not permitted to avail themselves of any devices under patents other than those under which they now manufacture, even after the expiration of such patents. This limitation which they may have assumed is not for the protection of the defendant company, to which they have sold their patents. The defendant has covenanted for fifty years not to manufacture under all that is valuable of the present patents, to wit, those patents under which their licensees are now manufacturing. Nor are these manufacturers permitted to utilize any inventions which they may make, or any

new patents of which they may acquire control. Not only have they crippled themselves, but they have agreed not to allow to be manufactured in any building controlled by them, or either of them, in the United States, except Montana, any harrows except those that they shall manufacture. And it is further stipulated that these manufacturers shall comply with all the requirements of the board of directors of the National Harrow Company with reference to their sales, which requirements shall be uniform with all agents and licensees. The contract can receive no other construction. The defendant itself has so construed it. Under this situation this defendant has assumed to fix the prices and terms for the sale of harrows by these manufacturers, as set forth in Exhibit E. These prices are not based upon the cost of manufacture, but are to be uniform with all manufacturers upon a certain style of harrow. But this stipulation is a very broad one. As practically construed by the defendant, it gives the defendant absolute power to regulate the prices at which these harrows shall be sold; to raise or lower them at pleasure. It may fairly be construed to give to this defendant the absolute power to control the manufacture, as well as the sale, of the harrows; to regulate the production, subject only to the condition that the requirements of the defendant's board shall be uniform with all manufacturers. It is claimed by the defendant that the price fixed is less than the price at which the majority of harrows had been theretofore sold. It is considerably in excess, however, of the price at which others were sold. And in excess of the price which the plaintiffs re-

Harrow Company and the parties in question.¹ In this case the defendants were the owners of two certain patents, under which they had been manufacturing and selling harrows; they joined the combination and assigned to the National Harrow Company their patents, whereupon that company issued to them its licenses to manufacture and sell harrows. In this particular case the defendants being individuals, a New Jersey corporation was organized as an intermediary, and that corporation also issued its licenses to defendants to continue the manufacture. The effects of these several agreements are recited as follows: "It will be perceived that the corporation through whose instrumentality the purposes of the combination are effected is simply clothed with the legal title to the assigned patents, while the several assignors are invested with the exclusive right to sell and manufacture their old style of harrows under their own patents; but all of them must sell at uniform prices and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other style or kind of float spring-tooth harrow than they are thus licensed to make and sell. Now, it is quite evident to me, as well by the papers themselves as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring-tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained. On the contrary, the courts have repeatedly adjudged combinations between a number of persons engaged in the same general business to prevent competition among themselves, and maintain prices, to be against sound public policy, and therefore illegal."²

ceived for their harrows. But there is nothing to prevent the defendant at any time from raising this price at its will. It is hard to conceive how a monopoly could be more firmly intrenched, or how competition could be more effectively strangled."

¹ National Harrow Co. v. Hinch et al. (1896), 76 Fed. R. 667.

² Regarding the effect of the patents the court said: "I am not able to concur in the view that the principle of these cases is inapplicable here, because the agreement in ques-

§ 636. In another case¹ a corporation entered into two contracts by which the National Harrow Company granted to it the right to manufacture in the state of Michigan four kinds of spring-tooth harrows covered by patents held by the Michigan corporation. For some time the Michigan corporation made reports of the harrows it sold and paid the royalties according to the terms of the contract, but subsequently it refused to report and pay royalties. Action was brought by the National Company to recover the stipulated damages, \$5 for each harrow sold and not reported, and also to compel the Michigan corporation to a specific performance of the contracts. In holding the National Company an illegal combination, and all contracts in furtherance thereof void, the New York supreme court said:

"It is apparent that the plaintiff and its predecessor, The National Harrow Company of New York, were not organized for the purpose of manufacturing or dealing in float spring-

tion involves patents. It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of independent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively-used article, competition between them is the natural and inevitable result, and thereby the public interest is promoted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade and destroys competition, is as injurious to the community and as obnoxious to sound public policy as if the confederates were dealing in unpatented articles. To the present case may well be applied the remarks of the supreme court of Pennsylvania in *Morris Run Coal Co. v. Barclay Coal Co.* (1871), 68 Pa. St. 173: 'This combination has a power in its confederated form which no individual

action can confer.' By the united action of more than a score of different manufacturers, natural and salutary competition is destroyed. To sanction such a result because accomplished by a combination of patentees would be, I think, to pervert the patent laws. Moreover, it is to be noted that under these license contracts the licensees can only make or sell their own specific form of harrow. All other forms, whether patented or unpatented, are prohibited to them. For this interdiction there is no justification. In the case of *Harrow Co. v. Quick* (1895), 76 O. G. 1574, 67 Fed. R. 130, Judge Baker expressed the opinion that this combination was unlawful and against sound public policy. I am constrained to regard the license contracts sued on as part of an illegal combination, and in unwarrantable restraint of trade. I must therefore deny the plaintiff the relief sought. The other defenses I need not consider."

¹ *National Harrow Co. v. Bement & Sons* (1897), 21 App. Div. 290.

tooth harrows, but for the purpose of bringing the manufacturers of such harrows under the control of a single corporation having the power to fix the prices at which such harrows should be sold, and to limit the manufacturing of harrows to the kinds in use on the 1st day of April, 1891, and to limit each licensee of the National Harrow Company to the manufacture of such harrows as the licensee had made and sold under his patents prior to their assignment, unless the licensee should become a sub-licensee of some other licensee of the National Harrow Company. The contracts entered into by the manufacturers preliminary to the organization of the New York corporation disclose these purposes, which are sought to be carried out by the contracts or licenses A. and B., dated April 1, 1891, copies of which are attached to the complaint, and on which this action is brought.

“It is contended that, because the contracts do not authorize the plaintiff to raise the prices of harrows above those fixed in the contracts, but simply authorize the plaintiff to decrease the prices at which harrows shall be sold, it is not a provision void as against public policy. By these contracts the prices of harrows are fixed, but the defendant is authorized to sell them at from forty-three to forty-five per cent. less than the prices fixed. A contract fixing the prices of harrows at more than forty per cent. above their value or selling prices and authorizing the licensor to reduce, but not to increase, the prices, as effectually controls the prices, for all practical purposes, as though the power to increase had been expressly reserved to the plaintiff. It would hardly be practicable to fix the prices at more than forty-three or forty-five per cent. above the selling prices of the harrows. The case shows that, by reason of the fall in prices of materials and labor, harrows could be manufactured at the date of the trial of this action for sixty-eight per cent. of their cost in April, 1881; but the defendant and all other licensees of the plaintiff are by their contracts prohibited from lowering the prices, except by the consent of the plaintiff.

“It seems to me that the provisions of the contracts authorizing, in effect, the plaintiff to fix the prices at which harrows shall be sold during the existence of these patents, and providing that the defendant shall not directly or indirectly manu-

facture or sell any float spring-tooth harrows, without teeth or attachments applicable thereto, other than those it is authorized to manufacture by the terms of the contracts, are void as against public policy. No matter what improvements are made in float spring-tooth harrows, this defendant and all other licensees of the plaintiff are prohibited from adopting them, and they are all confined to the manufacture and sale of float spring-tooth harrows covered by the eighty-five patents specified in the contracts. These provisions not only stifle competition between the plaintiff's licensees, but effectually prevent them from attempting to make any improvements in harrows.

"That combinations for the purpose of limiting the supply and fixing the prices of articles of general use during long periods are unlawful has been so often decided as not to require the citation of authorities."

§ 637. Regarding the contention that a spring-tooth harrow is not such an instrument of general use and utility as to render combinations formed to control its price and production illegal, the court said: "A harrow is an implement as important and as generally used by farmers as a plow, and is quite as necessary for the proper cultivation of land as any other agricultural implement, and is in use on every properly cultivated farm. Float spring-tooth harrows have come into general use and have largely superseded the old-fashioned square and three-cornered harrows or drags having peg teeth; and I think it needs no argument to show that a combination formed for the purpose of controlling their prices, limiting their production, preventing competition among manufacturers, and also preventing further improvement in them, is contrary to public policy as declared by the statutes of this state and by a long line of decisions in this and other jurisdictions. Indeed, it has been held in three cases in which the plaintiff and its predecessor, the New York corporation of the same name, were parties, that a combination to restrain the production and control the prices of these harrows was contrary to public policy and void."

§ 638. **Combination of manufacturers of woodenware.**¹—The Western Woodenware Association was a corporation organized under the laws of the state of Illinois, for the purpose

¹ *Western Woodenware Ass'n v. Starkie et al.* (1890), 84 Mich. 76, 47 N. W. R. 604.

of carrying on the business of manufacturing and selling woodenware. In 1888 certain persons engaged in a similar business entered into a contract to sell to the association their assets and business for the sum of \$6,000, and agreed "not to become engaged in the manufacture of tubs and pails during the next five years in the states of Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana or Ohio, or allow their property at St. Louis, Michigan, to be used for that purpose, nor to sell said property to any one for that business, except by consent of said second parties; and in case any of the parties of the first part violate this agreement they do hereby agree to pay to said second party \$2,000 for damages for violating this contract."

Contrary to this provision of the contract the parties engaged in the manufacture and sale of woodenware, whereupon the association filed a bill to enjoin them from continuing such business.

In denying the relief sought, and in holding the contract void as contrary to public policy, the court said that it was manifest that the association simply intended to take the parties in question out of the manufacturing business and close the shops,—that it did not enter into the contract for the purpose of carrying on the business. In this connection the court said: "Here a large manufacturing business has been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the state. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other of the states of the great northwest, teeming with its millions of people. If the complainant could enforce this contract against Starkey, Ferris and Olmsted, and shut the doors of that shop, and prohibit them from again opening them for five years in any one of those states, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the state, and in the other seven states, and compel the parties now owning and operating them to remain out of business for a term of years, and hold the doors

of these shops shut during such period; for the contract which complainant seeks to enforce provides that these parties shall not allow their property to be again used for that purpose within the time limited, nor to sell it to any one for that business, except by consent of the complainant, and this under a penalty of \$2,000."

§ 639. Combination of distilleries.¹—In 1887 the Distilling and Cattle Feeding Trust was organized along trust lines. In the month of February, 1890, a special meeting of the certificate holders of the trust was held at Peoria to consider the advisability of organizing a corporation for the purpose of taking over the properties of the trust, and a resolution was adopted² "looking towards the incorporation of a company to

¹ *Olmstead v. Distilling & Cattle Feeding Co.* (1895), 73 Fed. R. 44.

² "Whereas, the trustees of the Distillers' and Cattle Feeders' Trust have recommended the formation of a corporation under the laws of the state of Illinois, to be called the 'Distilling and Cattle Feeding Company,' with a capital stock of \$35,000,000; and whereas, it is deemed advisable and for the best interests of the holders of the certificates of the Distillers' and Cattle Feeders' Trust that said corporation should be formed as recommended by the trustees, and that all the property now in the hands or under control of or represented or managed by the trustees of the said Distillers' and Cattle Feeders' Trust should be transferred to said corporation when formed and organized according to law, and that the certificates now held of the said Distillers' and Cattle Feeders' Trust should be exchanged for the stock of said corporation when issued (the said certificates being of the par value of \$100 each, and the said shares of stock also of the par value of \$100 each), giving to each certificate holder for each certificate of the par value aforesaid one share of the stock of said corporation of the par value aforesaid; therefore, now be it

"Resolved, by the holders of certificates of the Distillers' and Cattle Feeders' Trust now here present, that the trustees of the Distillers' and Cattle Feeders' Trust be and they are hereby authorized, empowered and instructed, upon receiving from the corporation known as the Distilling and Cattle Feeding Company all the capital stock of said company, to sell, convey, assign, transfer, set over and deliver to the Distilling and Cattle Feeding Company all of the right, title and interest of the trustees, as trustees of the Distillers' and Cattle Feeders' Trust, in and to all property, real, personal and mixed, of every nature, kind and description, including moneys and bills receivable; and that said trustees also cause such proceedings to be had by the various companies interested in the Distillers' and Cattle Feeders' Trust, by the stockholders and directors thereof, as to convey all the property of said companies to the said Distilling and Cattle Feeding Company, including therein all leaseholds, leases, contracts, and every nature, kind and description of property, including the good-will of the business of the several companies, which companies shall be received and accepted by the said Distilling and Cattle Feeding Company

be known as the Distilling and Cattle Feeding Company, with a capital stock of \$35,000,000, which company would take over all the property under the control of the trustees of the Distillers' and Cattle Feeders' Trust; that said property

in full payment for the entire capital stock thereof.

"And resolved further, that upon receiving the stock of said company, as aforesaid, the said trustees proceed with all reasonable dispatch to exchange it for the certificates of the Distillers' and Cattle Feeders' Trust, share for share, and that the said certificates of the said Distillers' and Cattle Feeders' Trust, when received upon said exchange, be held by the said trustees until such time as a complete exchange is effected of the stock of the said Distilling and Cattle Feeding Company for all the outstanding certificates of the trust, and when such exchange has been made and all the property has been transferred and conveyed to said corporation as contemplated herein, the said certificates of the Distillers' and Cattle Feeders' Trust shall be canceled by said trustees.

"Resolved further, that the remaining portion of the capital stock of the Distilling and Cattle Feeding Company, after making exchange for the certificates aforesaid of the necessary amount, be used by the said trustees in protecting and taking care of, as they shall deem best and most advisable, the outstanding contracts and obligations of the trustees and the various companies interested in the Distillers' and Cattle Feeders' Trust; and should they deem it for the best interests of all parties, they are hereby authorized to transfer said surplus of stock to the Distilling and Cattle Feeding Company upon condition that the latter shall assume and agree to carry out all the outstanding contracts of the trustees and of the various

companies interested in the trust, and shall protect the trustees and the several companies against the same.

"Resolved further, that it is distinctly understood, in the reorganization into a corporation under the laws of Illinois, such agreements shall be made by the trustees with the new corporation as shall require the latter to assume all obligations and contracts of the trustees and the various plants, and keep and carry out the same to the same extent as the various companies are obligated to do.

"Resolved further, that in case any of the holders of certificates of the Distillers' and Cattle Feeders' Trust refuse or neglect to exchange certificates for shares of stock, as herein provided, said trustees, as trustees for such persons, shall hold such shares of stock and receive the dividends thereon for the use and benefit of the holders of such certificates, and said shares of stock, with the accumulated earnings thereon, shall be turned over to such certificate holders whenever ready and willing to exchange their certificates for such shares of stock; and whenever a complete exchange has been made by the trustees, and when all outstanding contracts of the trustees and of the various companies interested in the trust have been fully provided for and protected, the trustees shall then wind up the affairs of the trust, and the trust agreement shall be considered as annulled and canceled; and the trustees are hereby directed to proceed with all reasonable diligence to carry out the instructions aforesaid, and when they

should be transferred according to law to the new corporation, and the stock of the new corporation exchanged for the certificates of the Distillers' and Cattle Feeders' Trust; in short, the transfer of the entire property and assets, together with all contractual liabilities of the old Distillers' and Cattle Feeders' Trust, to the new corporation. Upon receiving the capital stock of the new corporation the trustees of the old trust were to distribute the same among the various holders of the old trust certificates, and the old trust certificates were to be canceled."¹

have so done they shall be deemed completely discharged from all further liability and duties as trustees."

¹For an interesting statement of the economic conditions leading up to the formation of the "Whisky Trust," see *Pol. Sci. Quarterly*, vol. IV, p. 296. The following extract from this article illustrates the influence of artificial conditions created by law upon the creation of combinations: "It is well known that, from the establishment of our government till the outbreak of the civil war, distilled spirits were for the most part comparatively free from taxation by the United States. The tax levied by the recommendation of Alexander Hamilton, which led to the whisky insurrection in Western Pennsylvania, was comparatively very light (only nine to eleven cents per proof gallon, as compared with ninety cents at present), and even this was repealed soon after the accession of Jefferson to the presidency. From that time, with the exception of four years (from 1813, when an increase of revenue was necessary to carry on the war, till 1817), spirits were free until the outbreak of the Rebellion. As a consequence they were sold at a very low price,—twenty-four cents on the average in New York for the five years preceding 1862, with a minimum price of fourteen cents per proof gallon,—and there was little tempta-

tion to overproduction for either the home or foreign market. At the outbreak of the Rebellion the necessity for increased revenue that led to the imposition of internal taxes wherever it was thought that a revenue could be raised, 'without much regard to acknowledged politico-economic laws or precedents,' resulted, of course, very properly in the taxation of distilled spirits. The first tax of twenty cents a proof gallon (July 1, 1862) was followed March 7, 1864, by an act raising the tax to sixty cents per gallon. July 1 of the same year the rate went to \$1.50; and January 1, 1865, to \$2 per gallon. At each increase of the tax considerable time intervened before the highest rate was imposed. As a natural consequence distilleries were run to their utmost capacity, and even new distilleries were built to get a stock on hand. . . . When the period of speculation was over, the great amount of surplus capacity for manufacture and the large amounts of stored products on hand made it, of course, almost or quite impossible for distillers who did not practice frauds on the revenue to continue in business. The high taxes, however, led to such frauds that whisky often sold in the market for less than the amount of the tax. Another factor that contributed to the general depression was the lessened demand for alcohol for use in the arts

§ 640. The attorney-general of the state of Illinois began proceeding by *quo warranto* against the Distilling and Cattle Feeding Company, charging that it was in fact a direct continuation of the Distillers' and Cattle Feeders' Trust, and that the Distilling and Cattle Feeding Company had been so managed and operated by its said directors that it had come into the control and substantial monopoly of the business of manufacturing highwines, spirits and other distillery products from grain in the United States.

It was claimed on behalf of the defendant company, and the claim was not controverted, that it had not at any time since its incorporation exercised a monopoly of the trade in spirits, alcohol and highwines; that it had not produced to exceed sixty-five per cent. of said products; and that there were at the commencement of the proceedings in active competition some eighteen distillery companies with a capacity equal to at least two-thirds of the entire demand of the country.

The supreme court of Illinois held¹ that the Distillers' and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was therefore illegal (see § 612); that the conveyance and transfer of the properties of the constituent companies to the new corporation

and manufacture. With alcohol at thirty or forty cents a gallon it was used in large quantities for the manufacture of burning fluid, varnishes, furniture polish, perfumeries, patent medicines, even as fuel for cooking, etc., the United States revenue commission estimating that in 1860 not less than twenty-five million gallons of proof spirits were so used. When the tax was \$1.50 and \$2, or even fifty cents, as it was from 1868 to 1872, spirits, of course, became too expensive for such purposes. As the tax has been still higher since that date (seventy cents till 1875, and ninety cents since that time), no increased demand for such purposes has been felt. These causes, including the large amounts fraudulently manufactured in the earlier years of

the high taxes, had tended to keep the distilling business in a comparatively depressed condition after the speculative period following the war had passed. Even as early as 1870 or 1871 the distillers felt themselves compelled to enter into an agreement to limit their distilleries to two-fifths production; and all north of the Ohio, with two or three exceptions, made such an agreement."

See also in this connection Reports of the United States Revenue Commission, 1865-66, p. 2; also article by the late David A. Wells on "Distilled Spirits," in Lalor's Cyclopaedia of Political Science.

¹ Distilling and Cattle Feeding Co. v. People (1895), 156 Ill. 448, 41 N. E. R. 188.

was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, in the stock of the new corporation, which corporation thus succeeded to the trust, and its operations were carried on in the same way, for the same purposes and under the same agencies as before.¹

§ 641. A trust being illegal, the corporation which succeeds it and takes its place is also illegal, for the same reasons. The defendant company, by its certificate of organization, was authorized to engage in the general distillery business in Illinois and elsewhere, and to own property necessary for that purpose; but its power to hold property was limited to the

¹"But the defendant contends that, while this may all be so, the change in organization from an unincorporated association to a corporation, and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations, by means of which the control of those properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, have purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of all the capital stock of the corporations and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation and its board of directors. The conveyance and transfer of the properties of the constituent companies to the new corporation

was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes and by the same agencies as before. The trust, then, being repugnant to public policy, and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country — over production and prices — and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons."

purpose of its organization, and it had no power by its charter to enter upon a scheme of getting into its hands and under its control all, or substantially all, of the distillery plants and distillery business of the country for the purpose of crushing out competition and establishing a virtual monopoly of the business.¹

§ 642. The resuscitation of the combination.—The subsequent history of the Distilling and Cattle Feeding Company is interesting as illustrating the power of the federal court to conserve that which a state court is bent upon destroying.

The judgment of ouster against the Distilling and Cattle Feeding Company was pronounced in the circuit court of Cook county. This judgment was affirmed by the supreme court on the 13th day of June, 1895.

Upon the death or civil death of a corporation, all its real estate, by the strict rule of the common law, reverts to the original owners or their heirs, and all its personal estate vests in the crown in England, and the state here, and all debts due to or from it are by operation of law extinguished.² Equity, how-

¹ "But it is urged that the defendant, by its charter, is authorized to purchase and own distillery property, and that there is no limit placed upon the amount of property which it may thus acquire. By its certificate of organization it is authorized to engage in a general distillery business in Illinois and elsewhere, and to own the property necessary for that purpose. It should be remembered that grants of powers in corporate charters are to be construed strictly, and that what is not clearly given is, by implication, denied. The defendant is authorized to own such property as is necessary for carrying on its distillery business and no more. Its power to acquire and hold property is limited to that purpose, and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distilling plants and the distillery business of the country, for the purpose of controlling production and

prices, of crushing out competition and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its charter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the state by *quo warranto*, and we are of the opinion that, upon the facts shown by the information, the judgment of ouster is clearly warranted. It will accordingly be affirmed."

² Angell & Ames on Corp., 195.

ever, views the matter in quite a different light. In equity the corporation is regarded as a trustee holding the corporate property for the benefit of its creditors and shareholders, which, upon its dissolution or civil death, a court of chancery will lay hold of as a trust fund and distribute for their benefit.¹ The Illinois statute expressly provides that corporations whose powers may have expired by limitation or otherwise shall continue their corporate capacity during the term of two years, for the purpose only of collecting the debts due said corporation and selling and conveying the property and effects thereof.²

On January 25, 1895, pending the appeal in the supreme court, a stockholder of the Distilling and Cattle Feeding Company filed his bill of complaint in the circuit court of the United States for the seventh circuit praying for the appointment of a receiver. A receiver was appointed.³

Subsequent proceedings and the report of the receiver showed that the Distilling and Cattle Feeding Company was largely solvent, but that it had acquired by purchase, lease and otherwise a number of non-productive properties; that in the course of its operations it had dismantled a number of distilleries; that these unproductive properties and leases of pieces of realty, upon which stood dismantled distilleries, were incumbrances which it would be exceedingly convenient to get rid of.

In the proceedings in the United States circuit court, a certain reorganization committee representing practically all the stockholders of the old company intervened and petitioned the court to sell at public auction all the distilleries and properties which would have any value to a new company, and they offered to bid therefor the sum of \$9,800,000, payable, not in cash, but by offsetting their rights as stockholders of the old company in the assets of the old company against their *pro rata* share in the \$9,800,000 offer.

In short, the stockholders of the company, which had been condemned in the state court as illegal, appealed to the United States court to let them have their property back free from incumbrances in the shape of disadvantageous rebate contracts, leases and unproductive realty. It was suggested to the court

¹Life Association of America v. Fassett (1882), 102 Ill. 315.

²Sec. 10, ch. 32, Rev. St. of Ill.

³Olmstead v. Distilling & Cattle Feeding Co., Graves v. Same, Bayer v. Same (1895), 73 Fed. R. 44.

that by permitting the stockholders of the old company to organize a new corporation for the express purpose of taking over the properties of the old corporation, the court simply revived the trust under a new name. To this suggestion the court said: "The objection that the property ought not to be sold to these petitioners proceeds, apparently, upon the ground that the corporation attempted to create a trust or monopoly in that kind of property, and that these petitioners, representing upwards of three hundred and forty-seven thousand of the shares of the stock of defendant, were responsible for the unlawful conduct of the corporation,—upon the surmise that these petitioners are themselves, now and by this proposed purchase, attempting to monopolize the distillery business. It seems to me that there is no validity in this objection. In making their offer for this property, these petitioners are simply shareholders. In that capacity they are interested in the property in question, and have the right to preserve the same by buying it from the receiver, if the latter can be induced and empowered to sell. The court cannot assume that any improper use will be made of this property by the purchasers, nor can the court undertake to control the use of the property after it has been sold and conveyed by the receiver."¹

It will be of little use for state courts to pronounce judgments of ouster upon corporations which have forfeited their franchises, if the shareholders of those corporations can organize new corporations and go into the federal courts and purchase assets of the condemned companies. Suppose these same stockholders, instead of appealing to the federal court, had appealed to the circuit court of Cook county to return to them intact the properties of the Distilling and Cattle Feeding Company? Obviously, to grant the request, would have been to undo all that the *quo warranto* proceedings had accomplished.

§ 643. Combination of white lead manufacturers.—In a case not yet reported² the National Lead Company, a corporation organized under the laws of the state of New Jersey with a capital stock of \$30,000,000, brought suit against the Grote Paint Store Company for certain small amounts due for goods

¹ *Olmstead v. Distilling & Cattle Paint Store Co.*, in the supreme court of Missouri, decided August, 1899.
Feeding Co. (1895), 73 Fed. R. 44.

² *National Lead Co. v. S. E. Grote*

sold and delivered by the Lead Company to the Grote Company. It was not denied that the amounts claimed were correctly set forth, but the affirmative defense was set up that the National Lead Company was an illegal combination for the purpose of controlling the production and price of white lead and other commodities; that such acts were unlawful and a violation of the Missouri statute.¹

§ 644. It appeared that in 1887 the stockholders of eleven different corporations doing business in different states formed a combination known as the "National Lead Trust" "for the purpose of forming and creating a trust, and with the design of controlling, regulating and fixing the price of the commodities above mentioned, and with the design of controlling, fixing and limiting the amount of the manufacture, sale and production of said commodities." The trust was formed and absorbed

¹ "Section 1. Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation, to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to penalties as provided in this act. Sec. 2. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employee, or the directors or stockholders of any corporation, to enter into any

combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. Sec. 4. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void. Sec. 5. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment." Session Acts of 1891, p. 186.

some twenty additional competing companies engaged in the same line of business, including all of the concerns engaged in the manufacture of white lead in the state of Missouri. The trust continued until 1891, when the parties to the combination adopted a plan of reorganization "for the purpose of more perfectly establishing the combination, and of more fully controlling, fixing and limiting the production, manufacture and sale of the commodities heretofore mentioned, and for the purpose of more effectually regulating, controlling and fixing the price of said commodities." Pursuant to that plan the National Lead Company was organized and succeeded the National Lead Trust, and the properties and assets of the various corporations which were party to the lead trust were conveyed to the new company, together with the capital stock of the various constituent corporations; but the constituent corporations were kept alive, and it was claimed that this was done to prevent them and others from engaging in the business, from manufacturing lead in competition with the National Company.¹

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¹ The pleadings charged: "That immediately after the organization of the National Lead Company the trust certificates in the National Lead Trust were exchanged by the trust certificate holders for stock in the National Lead Company on the plan set forth in the resolutions of the certificate holders heretofore referred to and set forth; the National Lead Company assuming and discharging all the agreements and obligations of the trustees of the National Lead Trust, and since the transfer of the property of the different corporations to the National Lead Company has managed, controlled and directed the said corporations and all of the property of all of the corporations heretofore mentioned more fully and completely, and with the same intention and design, and for the accomplishment of the same purpose, as the property and business of those respective corporations were managed, operated

and controlled under the trust agreement by the trustees of the National Lead Trust; and that the National Lead Company is in fact a direct continuation of the National Lead Trust, and was organized for the express purpose of carrying out the purpose of the unlawful combination known as the National Lead Trust, and is a combination of the corporations and stockholders which composed the National Lead Trust, created by them for the purpose heretofore set out; that in carrying out said purpose the said combination has dismantled and closed more than fifty per cent. of the plants of the said corporations, and in the city of St. Louis and state of Missouri dismantled the plant of the W. H. Greggs White Lead Company, thus reducing the production of white lead in Missouri and in the United States to the extent of fifteen hundred tons per annum, and have closed and kept closed for the space of two

§ 645. The trial judge left it to the jury to find as a question of fact whether the National Lead Company was party to any pool, trust or agreement or combination such as is described in the statute. The jury returned a verdict for the Lead Com-

years the plant of the St. Louis Smelting & Refining Company, whose annual business amounted to more than \$18,000,000. besides having closed the Red Seal Caster Oil Works; that the National Lead Company has continued, by purchase or otherwise, to procure and obtain the control of other corporations engaged in business similar to those which the corporations heretofore set forth were engaged in, and did on or about July, 1893, obtain control of the entire capital stock of the Granby White Lead Company, a corporation organized and existing under and by virtue of the laws of the state of Illinois, and which at the time of the National Lead Company obtaining such control was engaged in the manufacturing, at East St. Louis, Illinois, of white lead, and in selling the same in the state of Missouri and in the United States, and that the said Granby White Lead Company was operating the largest, best equipped white lead plant in the United States, but that, for carrying out the purpose of said National Lead Trust and National Lead Company, the plant of said Granby White Lead Company has been closed since the National Lead Company obtained the control of the stock of said company, and it has thereby reduced the production of white lead in the United States to the extent of ten thousand tons per annum, of the value of more than \$1,000,000; that while the plant of the company is not being operated, and the company is not engaged in any business whatever, yet the National Lead Company still keeps the charter of the company alive for the purpose of pre-

venting and restricting the production and sale of white lead by keeping other corporations out of the business; that, through the means set forth, the National Lead Trust obtained control of, and the National Lead Company now controls, over eighty-five per cent. of the output of white lead in the United States, and over ninety-five per cent. of the capacity for the manufacture of same, and controls every carbonate of lead factory in the states of Missouri, Illinois, Kentucky, New York and Maryland, and a large majority of all other factories in the United States; that, as a part of the agreement for the purchase of the W. H. Gregg White Lead Company's plant, the National Lead Trust entered into an agreement with W. H. Gregg, the virtual owner of all the stock of said company, that he would never engage in the manufacture of white lead again, the purpose of which was to prevent the production of white lead in the state of Missouri and the United States; that the National Lead Company is, and has been since its organization, a member of an association known as the St. Louis Paint, Oil & Drug Club; that this club is composed of a large number of dealers in white lead and linseed oil, and that the National Lead Company and the other members of said club have had an understanding with each other that white lead and linseed oil would not be sold at a price less than that fixed by the club; that the National Lead Company did in 1893, during the period in which the goods the purchase price of which is here sued for were sold, enter into an agreement with

pany. On overruling a motion for a new trial the trial judge made the following memorandum: "The proof is ample that the plaintiff company is a gigantic trade and manufacturing combine, with a capital of thirty millions; that it owns three-fourths of the lead output and white lead manufacturers of this country, and has bought up and amalgamated a majority of the white lead and oil manufacturing plants in the country, and can therefore, to a great extent, control, fix or limit the amount and quantity of white lead and other articles to be manufactured."¹

In passing upon the case as presented the Missouri court of appeals held that an illegal combination cannot cloak its objects under the form of a corporation and evade the penalties provided by the anti-trust law.²

the Moffitt-West Drug Company by which it was agreed that white lead would not be sold by the Moffitt-West Drug Company below the price fixed by the National Lead Company, and at the same time the National Lead Company had an understanding, similar to the agreement with the Moffitt-West Drug Company, with the J. S. Merrill Drug Company, the Collins Bros. Drug Company, the Buehler-Phelan Paint Company, the Meyer Bros. Drug Company, all engaged in selling white lead and linseed oil in the state of Missouri, and a large number of other corporations, partnerships and individuals similarly engaged. And further answering, that the National Lead Company has entered into an understanding with all the manufacturers of white lead and linseed oil in the United States not controlled by the National Lead Company by which it is understood that the above commodities will not be sold below a certain fixed price. The answer concludes with the allegation that all the foregoing acts are unlawful and contrary to the laws of the state of Missouri (Session Acts 1891, p. 186), and preclude a recovery in this action, and defendant pleads the above act as a defense."

¹ Regarding the exclusion of testimony to show agreements with other concerns to fix prices the trial judge said: "Defendant offered to prove that the plaintiff had an agreement with the above-named companies, not that they jointly fixed the price of white lead and similar commodities, but that the plaintiff fixed the purchasing and selling price of its own products and none others. Upon that offer the testimony was excluded, the court holding that the plaintiff had the legal right to fix the prices of its own products, and its doing so did not bring the plaintiff within the penal statute above mentioned. . . . Had the plaintiff undertaken to fix the price of all white lead and kindred commodities with the different business companies named, defendant should have been allowed to show this; but when defendant simply offered to prove that plaintiff fixed the price of its own products, and under that allegation of the petition last herein set forth disclaimed any proof to show that plaintiff undertook or agreed with the other companies to regulate or fix the price of other outputs than its own, then the ruling of the court was correct."

² The opinion is summarized and

§ 646. The court, by Bond, J., said: "The crucial question is whether the plaintiff corporation, either in its organization or business operations in this state, has offended any of the provisions of its law? That the predecessor of the plaintiff, the 'National Lead Trust,' was an unlawful combination, both in purpose and fact, is sufficiently established by the nature of the agreement under which it was created and the methods and practices resorted to in furtherance of that agreement. The agreement in question can only be construed as a contract to suppress competition, fix the price of commodities and limit their production, and to restrain trade. Unless some one or all of these purposes had been entertained by the signers of the trust agreement, it would not have contained provisions looking to the acquisition by the trustees of the entire lead business of the country, nor would it have united in the accomplishment of that end a majority of the stockholders of the largest corporations dealing in that product. That it had these objects in view, and practically accomplished them, is evident from the fact that it started with a contract of eight corporations and terminated after having issued ninety million of trust certificates, and after it formed a combination of thirty corporations, constituting a large majority of the lead dealers of the country who had united themselves together in the effort to realize dividends upon the aforesaid capitalization out of the assets of less than one-fourth in value of the amount for which trust certificates had been issued. While the conclusion of the illegal purpose of the trust agreement is irresistible upon a consideration of its several provisions, and the manner in which they were carried out, it will appear from an examination of the cases that this result had been declared by every court called upon to review that agreement, or others substantially like it.¹ But the illegality of the organization and operation of the National Lead Trust does not involve the conclusion that the purchaser of its assets, whether a nat-

commented upon in the Central Law Journal, vol. 49, p. 99, and this is the only report at present available.

¹ Citing *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. R. 279; *Distillers' etc. Co. v. People* (1895), 156 Ill. 448, 41 N. E. R. 188; *Bishop v. Am. Preserving Co.* (1895), 157 Ill. 284, 41

N. E. R. 765; *People v. N. R. S. R. Co.* (1890), 121 N. Y. 582, 24 N. E. R. 834; *Unckles v. Colgate et al.* (1896), 148 N. Y. 529; *United States v. Freight Ass'n* (1897), 166 U. S. 290, 17 Sup. Ct. R. 540; *United States v. Joint Traffic Ass'n* (1898), 171 U. S. 505, 19 Sup. Ct. R. 25.

ural or artificial person, succeeded also to the status of that illegal combination under the laws enacted in this state for the punishment of pools, trusts and conspiracies. For the mere purchase by one of the assets which another has employed for an illegal purpose does not of itself imply that they will be used by the purchaser for the purpose of effectuating the objects to which they had been devoted by the seller. Such an intent on the part of the purchaser, if inferable, must be gathered from proof of all the circumstances characterizing the transaction, as well as his subsequent conduct. As to these sources of proof, the record in the case under review shows that the beneficial owners of the property were the subscribers to the National Lead Trust and holders of its certificates, and that these same persons remained the beneficial owners of the same property after it was converted into the capital of the plaintiff corporation, the only difference being that each holder of a trust certificate received in lieu thereof shares of stock in the new corporation at an agreed rate of exchange, and the further fact that the legal title to the property was put into a corporate entity instead of a body of nine trustees appointed under the trust agreement. The sale itself was titular rather than real.”¹

¹ Regarding the responsibility of a corporation for the acts of its members and agents, the court said: “The first section of the act of 1891, *supra*, provides that any corporation wherever created which is ‘organized to do business in this state, or any . . . individual or other association of persons whatsoever who shall create, enter into, become a member of or a party to any pool, trust agreement, combination, confederation or understanding with any other corporation, . . . individuals, or any person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or in the same manner to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state,’ ‘shall be deemed

and adjudged guilty of a conspiracy to defraud, and be subjected to penalties as provided in this act.’ Can it be rationally held that the legislature had in view the commission of the criminal offense created in the foregoing section by a corporation as such, separate and apart from the individuals composing it? There is no legal ground upon which such a view can be entertained. A corporation can only act through its members or their agents. The corporate entity with which the law clothes it for special purposes is not self-acting, hence there was no thought of its action only in the mind of the framers of the statute. The evident purpose of the legislature was to specify certain acts, which, if done by its stockholders or governing bodies, should constitute a crime on the

§ 647. Combination of manufacturers of glucose.¹—The Glucose Sugar Refining Company of New Jersey was organized in 1897 with a capital stock of \$14,000,000 preferred and \$26,000,000 common. Prior to its organization certain option contracts had been secured upon the various plants and prop-

part of the corporation. It did not contemplate the commission of an offense by an impalpable abstraction, which could neither think nor act; but it intended to bind this corporate entity by the imputed actions of its human agencies. In other words, the legislature referred to the corporation in its true essence as an association of persons without which it could not exist, and through whom alone it must perform all its functions as a corporate being. Citing Morawetz on Corporations, sec. 227; Taylor on Corporations, sec. 51; State v. Standard Oil Co. (1892), 49 Ohio St. 137, 30 N. E. R. 279; Buffalo Oil Co. v. Standard Oil Co. (1887), 106 N. Y. 669, 12 N. E. R. 826; Boogher v. Life Ass'n of America (1882), 75 Mo. 319. Hence it must follow that if the stockholders and governing officers of the plaintiff corporation combined with each other to violate any of the provisions of the section under review through the instrumentality of their corporate entity, then the corporation composed by them was a party to such illegal combination within both the letter and the spirit of the above section of the act of 1891. Or correctly stated, that a combination which is illegal under the anti-trust law cannot be operated under the cloak of a corporation, and by its constituent members or governing bodies. This conclusion is believed to be irresistible in reason and has received the unwavering support of the courts and the text-writers. Ford v. Milk Shippers' Ass'n (1895), 155 Ill. 166, 39 N. E. R. 651; People v. Gas Trust Co. (1889), 130 Ill. 268, 22 N. E. R. 798; Distilling, etc. Co. v. People (1895),

156 Ill. 448, 41 N. E. R. 188; Strait v. National Harrow Co. (1891), 18 N. Y. Supp. 224; Beach on Monopolies, sec. 158; Hirsch on Com. Corp., p. 86; Am. Biscuit and Mfg. Co. v. Klotz (1891), 44 Fed. R. 721; National Harrow Co. v. Quick (1895), 67 Fed. R. 130; Merz Capsule Co. v. U. S. Capsule Co. (1895), 67 Fed. R. 414. In the case of Ford v. Milk Shippers' Ass'n, *supra*, the members of a milk trust, subsequently incorporated, brought an action against a purchaser of the commodity sold by the corporation, who defended on the ground that it was formed in furtherance of a trust scheme, and transacting business in contravention of an anti-trust act substantially the same as that pleaded in defendant's answer in the present action. It was insisted for the plaintiff that being a corporation it could not violate the statute, to which defense the supreme court of Illinois answered as follows: 'The corporation, as an entity, may not be able to create a trust or combination with itself, but its individual shareholders may, in controlling it, together with it, create such trust or combination that will constitute it, with them, alike guilty.' The point in judgment in that case is identical with the issues presented in the one before us. The conclusion reached by the Illinois court is logical, fully sustained by the above and other authorities, and in exact accord with the views heretofore expressed in this opinion."

¹ Harding v. American Glucose Co. et al. (1899), 182 Ill. 551, 55 N. E. R. 577.

erties afterwards taken by the Glucose Sugar Refining Company. These option contracts ran to a Chicago trust company, and in some instances provided that the purchase price was to be paid part in cash and part in stock of a new corporation about to be organized, and in other instances the option contracts provided that the trust company might pay at its option in stock or cash. The option contracts also provided that the vendor corporations should not engage in the handling or manufacture of glucose for certain terms of years within a thousand miles of Chicago. After securing the option contracts and the making of necessary assessments for raising of the necessary money, the new corporation was formed and in due course of time the various option contracts were turned over to it, and the several properties of the vendor corporations were duly transferred to the new corporation, the Glucose Sugar Refining Company.

A stockholder in one of the vendor corporations, namely, the American Glucose Company, also a New Jersey corporation, but with its plant in Peoria in the state of Illinois, objected to the transfer of the plant and filed a bill to enjoin the same.¹

¹ As this is the most important decision affecting the legality of corporate combinations of recent organization, the issues may be stated a little more fully. "The bill in this case is filed by a stockholder in the American Glucose Company, a corporation organized under the laws of the state of New Jersey, but doing business and owning property in Peoria, in Illinois. The stockholder who files the bill is a citizen of Illinois. The American Glucose Company owned a plant, consisting of real estate, together with the buildings and machinery located thereon, and also personal property, in the city of Peoria, in Illinois. The land upon which the plant is situated is specifically described in the bill. The primary object of the bill, and the chief relief sought by it, are to prevent the officers and directors of the American Glucose Company from selling and disposing of its plant in

Peoria, and from closing out the business, in which it there engaged, of manufacturing glucose and grape sugar. The bill charges that the officers and directors of the corporation have been squandering its assets by diverting the profits made in its business to their own use; and that in further consummation of their fraudulent disposition of the property of the company they are about to make a sale of the manufacturing plant in Peoria to a new corporation organized under the laws of New Jersey, and to give up and abandon the business of the company as theretofore conducted in Peoria. The bill further charges that not only is the American Glucose Company about to make a sale of its plant to the new corporation, but that five other corporations, engaged in the same business of manufacturing glucose and grape sugar, are about to make sales of their respective plants to the

Upon the filing of the bill the American Glucose Company and several of its officers filed their answers, which answers were afterwards withdrawn, but not until replications had been filed and some evidence taken on behalf of the plaintiff. The subsequent withdrawal of the answers of the American Glucose Company and its officers enabled complainants to take a default and decree *pro confesso* against them, the allegations of the bill being thereby confessed. The supreme court in passing upon the case, however, took into consideration the testimony that had been taken while the answers and replications thereto were on file, so that the case as finally presented to the supreme court was in a shape decidedly adverse to the corporate combination under investigation, all allegations in the original bill against the American Glucose Company and against its officers being taken as confessed, and weight being also given to the testimony taken by complainants. In short, the presentation was one-sided, the only defenses urged by the Glucose Sugar Refining Company (the corporate combination) being of a technical character.¹

same newly-organized corporation; that all of said sales constitute one transaction, and that the sale of the American Glucose Company is merely a part of that transaction. It is charged in the bill that the arrangement by which the proposed new corporation is to take conveyances of all these plants constitutes a giant pool, trust or combine, formed for the purpose of regulating, fixing and controlling the prices of glucose and grape sugar, and of suppressing competition in the manufacture thereof, and of creating a monopoly therein."

¹ Among the facts shown by the evidence and confessed by the default to the bill were the following: "In the spring of 1897 six corporations were engaged in the manufacture of glucose,—two of them in the state of Iowa and four of them in the state of Illinois. They were the Chicago Sugar Refining Company, operating in the city of Chicago; the

American Glucose Company, operating in the city of Peoria; the Peoria Grape Sugar Company, also operating in the city of Peoria; the Rockford Sugar Refining Company, operating in Rockford, Ill.; the American Preservers' Company, otherwise spoken of as the Davenport Sugar Refining Company, operating at Davenport, Iowa, and the Firmenich Manufacturing Company, operating at Marshalltown, Iowa. There was another manufactory of glucose at St. Charles, Ill., known as the St. Charles Glucose Company, operated by one Charles Pope of St. Charles and Chicago. Pope refused to enter the combination hereinafter mentioned at the outset, and is spoken of by some of the witnesses as an 'awkward' competitor. The Pope Manufactory, however, was of small capacity compared with the others. All of these corporations, thus engaged in the manufacture of glucose and grape sugar, were com-

§ 648. The Illinois supreme court sustained the contention of the complainant and granted the relief prayed for, holding:

First. "That all the corporations acted together in the matter is shown clearly by the correspondence, including the let-

petitors with each other in that business. The proof shows that glucose cannot be successfully manufactured except in what is known as the corn belt of the United States, including the states of Illinois, Iowa, Kansas, Missouri, and parts of Nebraska, South Dakota, Kentucky and Indiana. The corn belt constitutes an ellipse of about nine hundred and fifty miles in length from east to west and about seven hundred miles in width, with Peoria as the geographical center, and all within a thousand miles of Chicago. The products of glucose are extensively used, and it is an important constituent in the matter of making table syrups, jellies and jams, and is also used in the manufacture of beers and wines and cordials. The manufactories, as above named, consumed a little more than one hundred thousand bushels of corn daily in the manufacture of their products. The American Glucose Company consumed daily about twenty-six thousand bushels of corn; the Chicago Sugar Refining Company consumed in said manufacture about twenty-six thousand bushels of corn daily; the Peoria Grape Sugar Company, which was, however, slightly crippled by a fire consuming part of its plant, consumed therein about fifteen thousand bushels of corn daily; the Rockford Sugar Refining Company consumed about sixteen thousand bushels of corn daily; the Davenport Sugar Refining Company, or the American Preservers' Company, consumed about nine thousand bushels of corn daily; and the Firmenich Manufacturing Company consumed about nine thousand bushels

of corn daily. The capacity of the Pope Manufacturing Company was about six thousand or seven thousand bushels of corn daily. Some time in May, 1897, as nearly as we can gather from the records, a scheme was formed for the purpose of uniting all these corporations in one ownership. The plants, including both real and personal property so far as they were engaged in the manufacture of glucose and grape sugar, were to be transferred by these corporations, respectively, to a new corporation to be organized under the laws of New Jersey. Such corporation was not organized completely until August 2, 1897. Its charter, or certificate of organization, bears date of August 2, 1897, though it would appear that it did not go into practical operation until August 3, 1897, or shortly thereafter. The parties who were engaged in forming, promoting, carrying out and consummating the scheme for the consolidation of the property interests of all of said corporations were principally the officers, directors, attorneys and majority of stockholders in the old corporations, respectively. Nearly all of them, if not all of them, were citizens of Illinois. The principal persons engaged in forming and consummating this consolidation were Norman B. Ream and John W. Doane, who were largely interested in the Rockford Company, above mentioned; William Hamlin, the president of the American Glucose Company; Conrad H. Matthieson, of the Chicago Sugar Refining Company; two Chicago lawyers, one being also a stockholder in the Chicago Sugar Refining Company; Will-

ters of the attorneys, and by the facts that the option contracts of all the companies were delivered at the same time to the same repository, to wit, the bank, to be transferred by the bank as the promoters of the scheme should direct, and by the fur-

iam H. Henkel, secretary of the Illinois Trust & Savings Bank of Chicago; and one J. B. Greenhut. Norman B. Ream was a director in the Illinois Trust & Savings Bank of Chicago. Between the early part of May, 1897, and August 11th or 12th, 1897, all the plants above mentioned, except that of Pope, belonging to the six corporations hereinbefore described, were transferred to the Glucose Sugar Refining Company of New Jersey. After August 7, 1897, they ceased to be operated by the respective corporations theretofore owning them. As we understand the evidence, these six corporations were, with the exception of the Pope Manufactory at St. Charles, Ill., the only manufactories engaged in the manufacture and sale of glucose and grape sugar within the limits of the corn belt already described. The negotiations and transactions leading to the result thus accomplished were conducted secretly and with great caution. The organization of the new corporation, which was to be vested with the title to the plants, was deferred until the last moment, and was not consummated until the day before, or the day on which, the present bill was filed."

The method adopted for the consolidation of the several properties was described in the supreme court as follows: "Option contracts were drawn up,—one for each of the corporations already mentioned. By the terms of these option contracts which were made between each of said corporations on the one part, and the Illinois Trust & Savings Bank of Chicago on the other, the corporation

agreed to sell all its real and personal property and plant, and leaseholds, machinery, easements, buildings and fixtures and utensils located at the place at which it was engaged in the manufacture of glucose, together with its good-will, trade rights, trademarks, and the right to use its patents, to the bank upon the request of the bank, or its transferee, provided such request should be made before August 15, 1897. The option contract between the Firmenich Manufacturing Company of Iowa and the Illinois Trust & Savings Bank of Chicago was dated May 24, 1897; the contract between the Rockford Sugar Refining Company, Limited, of Illinois and the bank was dated May 25, 1897; the contract between the Chicago Sugar Refining Company of Illinois and the bank, and that between the Peoria Grape Sugar Company and the bank, were dated June 7, 1897. There are two contracts between the American Preservers' Company of West Virginia and the bank, one dated June 8, 1897, and the other dated July 19, 1897,—the latter recited to be a substitute for the former. The second contract between the American Glucose Company of New Jersey and the bank was dated June 9, 1897. Some of these contracts state that a part of the purchase-money for the plant and property to be sold is to be paid in the stock of a corporation with a capital stock of \$40,000,000, of which \$14,000,000 is to be preferred stock, and \$26,000,000 common stock, which said corporation is about to be organized and to acquire said property, and also the properties specified in the contracts made between the five other corpo-

ther fact that all the deeds conveying the several properties to the new corporation were executed about the same time, and delivered simultaneously."

After referring to the telegrams and correspondence, the court continued: "Can there be any doubt, after reading these letters and telegrams, that these parties were engaged in a scheme to have all the six corporations shut down their manufactories and abandon their business? Can there be any doubt that the president of the American Glucose Company knew that the other corporations were shutting down their plants with a view to conveying them to a new corporation, and that, in transferring the plant of his own company, he was aiding the consolidation of all the properties in one giant trust? It must be remembered, in this connection, that preparations were all the time going on for the organization of the new corporation, and that this new corporation was organized on August 2 or 3, 1897, and took possession of and commenced operating all the plants of the six corporations, which had suspended business, on and after August 12, 1897. The letters thus quoted not only show that the contracts of sale to be executed by the various corporations selling their properties were to be uniform in their terms, but also show that the new company was to silence opposition, as well as competition, by providing places for the officers of the old companies, and by taking from them contracts not thereafter to engage in the manufacture of

rations and the bank. Some of these contracts provide that the bank may pay for the property, at its option, in the stock of the new corporation to be formed, instead of cash. The contracts also contain a provision, by the terms of which the vendor corporation and its officers agree not to buy, or sell, or manufacture glucose, or its kindred products or by-products, for a certain term of years within a thousand miles of Chicago, the said term of years being three years in some instances, and twenty-five years in at least one instance. The defendant in error, the Glucose Sugar Refining Company of New Jersey, a corporation which was to be organized according to the terms of these

option contracts, and which was finally organized as above stated, is a corporation whose certificate of organization provides that it shall have power to conduct business throughout the United States and all foreign countries with the object of manufacturing and selling glucose, and buying and selling corn, and all its products and by-products, and similar articles of merchandise, and to transport the same, and to do all lawful business incidental thereto; and said certificate further provides that the total amount of the stock shall be \$40,000,000, of \$100 per share, \$14,000,000 to be preferred stock, and \$26,000,000 common stock, etc."

glucose. This transaction is thus brought within the scathing condemnation of the supreme court of the United States in *United States v. Trans-Missouri Freight Ass'n* (1897), 166 U. S. 290, 17 Sup. Ct. 540, where it was held not to be 'for the substantial interests of the country that any one commodity should be within the sole power, and subject to the sole will, of one powerful combination of capital;' and where it was held to be unfortunate for the country to deprive it 'of the services of a large number of small, but independent, dealers;' and where it was held to be 'not for the real prosperity of any country that such changes should occur which result in the transferring an independent business man, the head of his establishment, small though it be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company, and bound to obey orders issued by others.' "

Second. That the facts set up in the bill of complaint disclosed the organization of an illegal combination; that it is immaterial whether a trust or illegal combination is effected through the instrumentality of trustees and trust certificates, or whether it is effected by the creation of a new corporation. The test is whether the necessary consequences of the combination is the control of prices or limiting of production, or suppressing of competition in such a way as thereby to create a monopoly. In this connection the court said: "A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor from the trustees. But the question in the present case is whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy, and is void." ¹

Further on the court said: "It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding,

¹ Citing 2 Cook, Corp. (4th ed.), sec. 503a.

or a scheme not embodied in writing, but evidenced by the action of the parties. In the present case each of six corporations, engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized, and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business; and it did all this with the knowledge and understanding that each of five other competing corporations was making the same kind of contract, and executing the same kind of conveyance, in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they at least constituted a scheme understood by all the corporations, and participated in by them all. The carrying out of the scheme, thus understood and participated in, would necessarily result in the suppression of competition in the manufacture of glucose, and in the creation of a monopoly in that business. A part of the scheme was that none of the six corporations or their officers should, for years, engage in the manufacture of glucose, and this feature of the scheme necessarily contemplated the wiping out of all competition in the business." Continuing: "The material consideration in the case of such combinations is, as a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time, if it sees fit to do so. It does not relieve the trust of its objectionable features that it may reduce the price of the article which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors. In the case at bar, however, the proof shows that, upon the completion of the new organization, and as soon as it began to operate the several plants conveyed to it, the price of glucose and its various products began to go up."¹

¹ Referring to the doctrine of public policy the court said: "The public policy of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and in the constant

Third. The demurrers admitted the allegations of the bill of complaint to be true; that the American Glucose Company was organized under the laws of the state of New Jersey, transacting business in Illinois; that it, together with the persons whose names appear in the record, created and entered into a trust or combination with other corporations, and with the Glucose Sugar Refining Company, to regulate and fix the prices of glucose and grape sugar, and to control the production thereof; that such a combination under the laws of the state of Illinois is illegal.¹

practice of government officials. When the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it indicates. The public policy of the state of Illinois has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly." And the court cited and reviewed *United States v. Trans-Missouri Freight Ass'n* (1897), 166 U. S. 290, 17 Sup. Ct. 540; *Craft v. McConoughy* (1875), 79 Ill. 346; *People v. Chicago Gas Trust Co.* (1889), 130 Ill. 268, 22 N. E. R. 798; *More v. Bennett* (1892), 140 Ill. 69, 29 N. E. R. 888; *Bishop v. American Preservers' Co.* (1895), 157 Ill. 284, 41 N. E. R. 765; *Distilling & Cattle Feeding Co. v. People* (1895), 156 Ill. 448, 41 N. E. R. 188.

¹ "By the act approved June 20, 1893, in regard to trusts and combines, the legislature of Illinois enacted 'that a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them, for either, any or all of the following purposes: First, to create or carry out restrictions in trade. Second, to limit or reduce the production, or increase or reduce the price, of merchandise or commodities. Third, to prevent competition in the manufacture, making, transporta-

tion, sale or purchase of merchandise, produce or commodities. Fourth, to fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this state; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up, and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth, to make or enter into, or examine or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card, or list price, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or

Fourth. That a stockholder in a corporation which is about to become a party to an illegal combination, and about to transfer its entire property and assets and business to such combination, which action is liable to forfeit the charter of the corporation and cause its dissolution, has the right to protest against such use of the property of the corporation by its managing officers, and to file his bill to enjoin the same. The rights of a protesting stockholder are seriously affected by the sale of the entire properties of a solvent and going corporation, and by the abandonment of its charter duties, and by a contract upon the part of the corporation not to further engage in the business authorized by its charter.¹

Fifth. Where officers of a corporation wrongfully deal with its property to the injury of the stockholders, the latter may maintain a bill against the company and such officers for relief against such misappropriation of the corporation assets; and where a suit cannot be instituted in the name of the corporation owing to the control exercised by the officers guilty of wrong-doing, equity permits a stockholder, either individually or on behalf of other stockholders similarly situated, to begin suit. In the case under consideration the bill alleged and the proof showed "that the officers and directors of the American

themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interests they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

¹ In this connection the court said: "The shares of stock owned by a stockholder derive their value from the corporate property and franchise, although the stockholder's legal property in his stock is distinct from the property of the corporation. *Porter v. Railroad Co.* (1875), 76 Ill. 561. If the shares derive their value from the corporate property and franchise, they will have no value, prac-

tically, when all such corporate property is disposed of, and the right to carry on business is destroyed. What was here attempted was an abandonment of the business and a sale of the assets without a legal termination or dissolution of the company. It makes no difference that the stockholder is to be allowed to receive his proportionate share of the proceeds of the sale of the property; he has the right to hold his investment in the form of stock, and a change of such investment against his consent is a change which affects his pecuniary or financial interests. He has the right to be the judge whether such a change in his pecuniary status shall be made, or whether he shall continue his investment in the form of stock."

Glucose Company and the majority of the stockholders were in favor of disposing of its property to the new corporation to be formed, and that they adopted a resolution to carry out such action against the protest of the complaining stockholder. Therefore no previous demand upon the managing officers to bring suit would have been availing. It follows, however, that where the bill in such case is filed by the stockholder, the final relief, when obtained, belongs to the corporation and all its stockholders, and not alone to the stockholder complaining."¹

Sixth. The right of a corporation to make a sale of its plant to another corporation cannot be upheld where it appears that the transfer is to a corporation created for the express purpose of taking over the properties and assets of other corporations, so as to use them in the suppression of competition and in the creation of a monopoly.

Seventh. A corporation organized under the laws of another state, owning property and doing business in the state of Illinois, is subject to the same regulations and restrictions which apply to corporations organized under charters granted by the state of Illinois.² "It is the settled doctrine of this state, established by many decisions of this court, that foreign corporations do not come into this state as a matter of legal right, but only by comity, and that said corporations are subject to the

¹ In this connection see *Porter v. Railroad Co.* (1875), 76 Ill. 561; *Green v. Hedenberg* (1896), 159 Ill. 489, 42 N. E. R. 851; *Bruschke v. Der Nord Chicago Schuetzen Verein* (1893), 145 Ill. 433, 34 N. E. R. 417; *Pomeroy, Eq. Jur.*, sec. 1095; *Stewart v. Erie & West. Trans. Co.* (1871), 17 Minn. 372; *Small v. Minneapolis Electro-Matrix Co.* (1891), 45 Minn. 264, 47 N. W. R. 797; *Abbott v. Am. Rubber Co.* (1861), 33 Barb. 578; *People v. Ballard et al.* (1892), 134 N. Y. 269, 32 N. E. R. 54; *Cook, Corp.*, ch. X.

² Section 26 of the Illinois act in regard to corporations provides that "foreign corporations and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions and

duties that are or may be imposed upon corporations of like character, organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act." Section 5 of the Illinois act in regard to corporations provides that corporations formed thereunder "may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation."

1 same restrictions and duties as corporations formed in this state, and have no other or greater powers."¹

A corporation cannot be permitted to come into the state for the purpose of asserting rights contrary to the laws of the state. And notwithstanding that the laws of the state of organization may confer upon officers and a majority of the stockholders powers as to disposition of real estate and assets, not conferred by the laws of the state of Illinois upon Illinois corporations, still if real estate in Illinois, owned by domestic corporations, cannot be used for the purpose of carrying out the business of an illegal combination, then real estate owned by foreign corporations in Illinois cannot be used for such purpose, and the mere fact that the corporation against which relief is sought by an objecting stockholder is organized under the laws of another state does not deprive the courts of the state of Illinois of power to grant relief to a dissenting stockholder who seeks to restrain his corporation from conveying real estate and transferring assets situated in the state of Illinois to an illegal combination.

Eighth. Where it appears that the manufacture of glucose and grape sugar and their products is confined to a certain corn belt embraced in a territory within a radius of fifteen hundred miles of Chicago, a contract not to manufacture and sell such products within a radius of fifteen hundred miles from Chicago for a period of twenty-five years is in unreasonable restraint of trade and void.

¹Citing Hazelton Boiler Co. v. Farmers' Loan & T. Co. v. Lake St. Tripod Boiler Co. (1892), 142 Ill. 494, 80 N. E. R. 339; Pennsylvania, etc. Co. v. Bauerle (1892), 143 Ill. 459, 33 N. E. R. 166; Bishop v. Am. Preservers' Co. (1895), 157 Ill. 284, 41 N. E. R. 765; El. R. Co. (1898), 173 Ill. 489, 51 N. E. R. 55; Freil et al. v. Fid. Bldg. & Sav. Un. of Ind. (1897), 166 Ill. 128, 46 N. E. R. 784; Rhodes v. Miss. Sav. & L. Co. (1898), 173 Ill. 621, 50 N. E. R. 998.

CHAPTER 18.

RIGHTS OF CAPITAL.

§ 649. Conflicting decisions.

650. Rights of capital as contrasted with the rights of labor.

651. Two views of the development of corporations.

652, 653. A corporation is essentially an economic factor.

654. Powers of state over corporations.

655. Nothing inherently evil in combination.

656. Right to combine is the right of the individual.

§ 649. Conflicting decisions.— The cases already reviewed show that—

1. There is no form of combination adopted by capital which has not been directly or indirectly approved by some court of record;

2. There is no form of combination adopted by capital which has not been directly or indirectly condemned by some court of record.

The decisions are in such conflict that it would be a waste of time to attempt to reconcile them upon any tenable theories.

Under the head of "Legal Combinations of Capital," the cases reviewed would seem to indicate that the rights of capital were somewhat parallel with the rights of labor.

Under the head of "Illegal Combinations of Capital," the cases reviewed would seem to indicate that capital has no rights at all commensurate with those enjoyed by labor.

When statutes applicable to combinations of labor and combinations of capital are reviewed, it will be found that the inequality apparent in the decisions is still more accentuated by legislative enactments.¹

¹ The discrimination that is being exercised between capital and labor in this matter of the right to organize was strikingly illustrated during the closing hours of the recent session of the House of Representatives. In the game of politics, which absorbed the attention of the House to the exclusion of all else during the closing hours, it seemed important to the party leaders on both sides that each party should place itself on record as emphatically opposed to trusts and combinations. During the last days of the session the Republicans brought two propositions be-

§ 650. Rights of capital as contrasted with the rights of labor.—It has been specifically held that labor may combine:

1. To raise the price of labor;
2. To limit the quantity of labor;
3. To restrict the production of labor by striking, which

fore the House: one a proposed amendment to the constitution giving congress larger power over trusts and combinations. This proposed amendment failed to secure the necessary two-thirds vote, the Democrats voting almost solidly against it.

The second measure was a drastic amendment to the Sherman act of 1890. To this proposed law the Democrats offered many amendments, among them an amendment to the effect that nothing in the act should apply to labor unions and labor organizations. Of all the amendments offered by the Democrats only this last-named amendment was adopted, and this was adopted with only eight dissenting votes. The proposed law was not acted upon by the Senate.

It is true that this entire farce was a matter of politics equally disgraceful to both parties, and it is also probably true that most of those voting for the act in the House felt sure that it would never become a law. At the same time the discrimination, so openly attempted, between capital and labor in the matter of organization shows the lengths to which even legislative bodies of some respectability will go.

While the House of Representatives was voting almost unanimously to except labor combinations from the law regulating and restricting combinations generally, a strike of street-car employees was in progress in St. Louis, during the first forty days of which fifteen persons were killed, seventy-five persons shot, one hundred and eight persons otherwise injured, four persons made insane by

the strike, thirteen women passengers beaten and eighty-one street cars wrecked. This destruction of life and property was caused in the effort to prevent non-union employees from operating the street cars. Many of those injured, including the women, were disinterested parties, simply attempting to ride as passengers upon the cars that were being run.

Assuming that the strike was a just one, that the demands of the striking employees were fair, nothing excuses the lawless efforts to prevent men who were willing to work from taking the places of the striking employees, and nothing excuses the vicious assaults upon passengers.

The demands of the striking employees have been summarized as follows: "That all conductors, motormen, gripmen, and all men employed in the sheds shall be compelled to be members of the union: that the officers of the union, together with the officers of the company, shall have full power to adjust all differences that may arise, and that in the event of their failure to agree shall, if mutually agreed to, place the case before three arbitrators; that any member suspended by the union shall be suspended by the company, without pay, until such time as the union requests his reinstatement; that any man elected to an office in the union requiring his absence for not more than a year shall, upon his retirement from such office, have his old place with the company."

If the foregoing is a correct summary, then many of the demands are

amounts to a withholding from the market, for the time being, of all labor in the particular occupation in order to increase the price of labor.¹

The decisions sustaining the right of labor to combine for these several objects clearly indicate that the magnitude of the combination of labor is no test whatsoever of its legality. The right of labor to combine is not limited in any manner whatsoever by the extent of the combination. And the facts recited in the many cases reviewed clearly show that the combinations of labor are quite as extensive as the very largest combinations of capital. They are so extensive that in some particular trades and occupations the entire labor is controlled by some combination.²

It is only when these combinations are found guilty of acts of a criminal, lawless and grossly oppressive character that the courts intervene to restrict in any manner their operations. So long as they are guiltless of criminal, lawless and oppressive acts the courts sustain combinations of labor, and encourage them to pursue their objects, even though in such pursuit they incidentally inflict incalculable damage upon employers and the community generally.

not only arbitrary and unreasonable, but involve agreements which would be of an illegal character. But whatever the nature of the demands, whether reasonable or unreasonable, legal or illegal, the reign of terror which followed the strike—and which seems to follow nearly every large strike—is simply appalling. Political cowardice of the most contemptible character on the part of executive officials is responsible for conditions which amount practically to anarchy.

¹ See § 551.

² The American Railway Union, which precipitated the great railway strike of 1894, was comparatively immature. It purported to embrace the various unions and organizations of railway employees throughout the entire country, but its organization had been so recently perfected, and

was so incomplete in its details, that the great strike ultimately collapsed; but it only collapsed after an immense amount of property had been destroyed, and after a cost to the railway companies, the public and the employees which can hardly be estimated. Perhaps one of the best and strongest of the railway organizations is the Brotherhood of Locomotive Engineers. That organization is so strong that by ordering a general strike it could practically tie up for an indefinite period every railway in the country. National combinations in other trades and occupations are being rapidly perfected. It is claimed that the national organization of machinists is already strong enough to tie up all the machine shops in the principal cities of the country.

Cases reviewed under the head of "Legal Combinations" tend to show that capital may combine

1. To raise prices;
2. To suppress competition;
3. To control production.

And that such combinations are entirely legal, provided they resort to no means and measures of a criminal, unlawful or oppressive character.

This line of decisions, taken in connection with the decisions affecting the right of labor to combine, places capital and labor upon a footing of absolute equality,—except, it should be added, that there are no decisions containing language so favorable to the combination of capital as that favorable to labor combinations contained in many of the decisions involving combinations of labor. In no line of decisions do the courts treat combinations of capital so tenderly and considerately and with such deference as they treat combinations of labor. Even in cases where it is shown beyond controversy that some particular combination of labor has been guilty of acts, not only criminal but outrageously oppressive, the courts, in condemning the criminal and oppressive acts, seem to feel under some obligation to express by way of apology a cordial indorsement of labor combinations generally, and to exhibit a deference towards such combinations which amounts almost to timidity. No such weakness is displayed towards combinations of capital, even in the cases most favorable to such combinations.

Little difficulty would be experienced if the decisions affecting combinations generally stopped short with declaring that combinations of labor and combinations of capital (a) for raising the price of labor and products; (b) for suppressing competition among laborers and among employers; (c) for controlling and regulating the quantity of labor offered and the quantity of products produced, are entirely legal, providing, in their means and objects, they contemplate nothing unlawful or oppressive. Decisions along lines so just and harmonious as the foregoing would enable combinations to be formed on one side to meet the demands of combinations on the other, and enable such combinations to treat upon a footing of equality one with the other, and in the unrestricted action and interaction of these powerful forces it may be safely assumed that the inter-

ests of the public would be fairly well conserved in the long run. If combination is the result of an economic tendency, there is no law of man strong enough to stifle it, and interference only works harm and disaster. Surely interference so one-sided as the encouragement of all combinations of labor and the condemnation of all combinations of capital can be productive of no conceivable good.

The line of decisions reviewed under the head of "Illegal Combinations"¹ and the many statutes to the same end hold that combinations of capital are illegal, and in many cases criminal, which tend

1. To raise prices;
2. To suppress competition;
3. To control production.

It has already been shown that in so far as these decisions rest upon the early laws relating to monopolies, forestalling, regrating and engrossing, they have no foundation whatsoever, and that in so far as they rest upon vague and indefinite rules of public policy their basis is most insecure and unsubstantial.

Many of the decisions are controlled by statutory provisions, which leave little to the discretion of the court. Some of the decisions are controlled by the general rules and principles governing corporation law. In so far as the courts have been controlled by plain statutory provisions, and in so far as the results have been due to the logical application of plain rules and principles governing corporation law, no criticism can be urged against the decisions. Aside from these controlling considerations it will be found upon a careful examination of the cases that they are based upon the wholly arbitrary assumption that any combination which tends to control prices, competition and production is disadvantageous to the community and contrary to public policy; whereas, in so far as the general economy of the community is concerned, the exact reverse is true.

§ 651. Two views of the development of corporations.—By courts and lawyers generally corporations are viewed as being primarily, if not solely, creatures of the law; as artificial bodies having no reason for existence save as conferred by legislative enactment. According to this view corporations are

¹See Part V.

looked upon as the lineal descendants of the oppressive monopolies, franchises and special privileges granted in early days by the crown; and successfully warred against by the people.

Beyond question the history of the law of corporations shows that it is directly connected with grants of monopolies and special privileges. Formerly the manner of creating a corporation was commonly by the grant of a special charter conferring upon the corporation special privileges of a more or less valuable nature. In process of time the creation of corporations by granting special charters was so abused that in this country constitutional provisions were adopted restricting the powers of legislatures to grant special charters, and corporations came to be organized under general statutes. These general statutes, as a rule, purport to confer upon the corporation no special privilege of any kind or character whatsoever. They simply provide that individuals, by complying with the formalities laid down, may take out a charter, organize, and enjoy the rights and privileges which attach to corporations generally, but none of which rights are of an exclusive character.

In the famous *Dartmouth College Case*,¹ the original charter was by letters patent from his majesty George III. This charter could have been revoked at any time prior to the adoption of the constitution of the United States. In holding that an act of the legislature of New Hampshire altering the charter without the consent of the corporation was unconstitutional and void, the supreme court, by Chief Justice Marshall, defined the corporation as follows: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and needless necessity, of perpetual conveyances for the

¹ Trustees of Dartmouth College v. Woodward (1819), 17 U. S. 518.

purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."¹

In the same case Justice Story suggested the following definition: "An aggregate corporation, at common law, is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges and capacities in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued, in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of

¹ Regarding the power of parliament over charters, Chief Justice Marshall said: "According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet, then as now, the donors would have no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interests in the property confided to their protection. Yet the contract would, at

that time, have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice and in law, it is now what it was in 1769. This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking the case out of the prohibition contained in the constitution."

its natural members, are yet considered as subsisting in the corporation itself as distinctly as if it were a real personage."

In these, as well as in nearly all definitions of corporations, the attention is fixed almost exclusively upon the legal character of the corporate body; courts are more concerned with the corporation as a legal entity than with its growth and development. In other words, courts tend to view corporations from the standpoint of the crown, to treat them as special creations which would have and could have no existence whatsoever were it not for the favor of the legislature. It so happens that the Dartmouth College charter was a special grant by the crown creating an eleemosynary corporation. The difference, however, between the charter of a private corporation for profit, such as a manufacturing or trading corporation, and a public corporation or an eleemosynary corporation, is very great indeed, so great in fact that it is unfortunate that the same term "corporation" is applied to both.

All this tends to show the intimate relation which exists between the law of corporations generally and the law of monopolies and special grants by the crown. It is therefore not surprising that courts and lawyers at the present day, in the consideration of all matters affecting corporations, unconsciously associate corporations with these early grants of special privileges, and both courts and lawyers by so doing unconsciously influence popular opinion regarding corporations, and tend to foster the prejudice which undoubtedly exist against corporate bodies.

§ 652. A corporation is essentially an economic factor.—A corporation is not simply a creation of law. Primarily and essentially it is a form of co-operation,—an economic factor,—and were its history carefully investigated it would be found, beyond doubt, that the corporate form of co-operation has been, like all other industrial, commercial, social and political forms, a matter of development; that in some sort it existed prior to its recognition by law; that the law simply sanctioned a form of organization which the commercial and industrial world found useful and indispensable. It is claimed that the corporation originated with the Romans,¹ and came into being as the result of economic forces. Large commercial transactions

¹ See Cook, Corp., ch. 1; and Sohm's Inst. of Roman Law.

and relationships made it absolutely essential that a number of individuals should be permitted to act as a collective body. It is not conceivable that the vast commercial and industrial affairs of modern times could be carried on without the use of these collective bodies known as corporations, and were there no law sanctioning the creation of corporations men would necessarily act together,—as they have frequently done in the past, and still continue to do,—in joint associations, huge partnerships, wherein some of the advantages of the corporate form would be enjoyed, although the members might not be wholly relieved from individual responsibility. Since the law is simply the application of common sense and reason to existing conditions, it would speedily be found wise to regulate by a general provision these large joint associations, and in the course of time the statutory provisions regulating such associations would inevitably develop into general laws very much akin to the general laws now in force providing for the forming of corporations. The law would follow the economic tendency, the collective bodies would be recognized, would be permitted to adopt names, and, in time, assume many of the responsibilities attaching to the individual members. All this would be so largely a matter of convenience that the law would be quick to recognize these economic tendencies, and, regardless of the entire history of grants of monopolies and oppressive special privileges by the crown, there would inevitably spring up in a progressive community organizations in form similar to the modern corporation.

§ 653. At the risk of some repetition the following propositions of an economic character may be laid down:

Co-operation means association, and

Association means combination, and

Combination means some form of corporate organization.

There can be no co-operation without association of some sort, and there can be no association without combination of some sort, and there can be no combination upon a large scale without the development of some form of corporate organization.

In this connection co-operation, association, combination, corporation, are practically interchangeable terms. Men co-operating together for certain purposes are combined together exactly to the extent of their co-operation, and *vice versa*.

Combination, therefore, is a condition of economic progress. If so, courts and legislatures are powerless to prevent; they may check and embarrass, but neither courts nor legislatures can prevent whatever is essential to the progress of the community. Law is effectual only in so far as it is in harmony with the natural tendency and drift of things; it is ineffectual in so far as it runs counter to the laws of economics and evolution.

Combinations of both labor and capital have come to stay — both are inevitable. The combinations of capital are quite as inevitable as the combinations of labor, for both rest upon the economic truth that co-operation is a condition of material progress.

These things being true, it is plain that the form of the combination is, comparatively speaking, quite immaterial. Co-operation being the essential thing, whether the co-operation takes the form of a partnership, a voluntary association, a corporation, a trust, or a corporate combination, is largely a matter of convenience and detail; and such details may, with no little propriety, be the subject of regulation by statute. It is when judicial and legislative interference goes beyond the matter of regulation, and endeavors to stifle and restrict, that mischief is done.

The history of the development of combinations of labor and combinations of capital from the earliest days of the English common law to the present time is a most interesting narrative of a long and bitter conflict between natural and irresistible economic and social tendencies and the law, a conflict which is still going on, and a conflict in which the ingenuity of man in evading artificial and arbitrary barriers to progress has been displayed in many ways. Law, being essentially a conservative force, is ever in the wake of progress.

The corporate combination is the latest outcome of this conflict.

§ 654. Powers of state over corporations.—In so far as corporations are concerned it is well settled that —

Each state may grant charters to corporations upon such terms as it pleases, or it may decline to permit the organization of corporations entirely.

Each state may define the terms upon which it will permit

corporations of other states to do business within its territory, or it may wholly refuse such permission.

The remedy, therefore, for any evils resulting from corporate organization or corporate combination lies wholly and naturally within the power of each particular state. Each state may, if it sees fit, limit the capitalization of a corporation to such sum that the absorption of many properties will be practically impossible; each state may specifically provide against consolidations of corporations and against the acquisition of competing plants and properties to any material extent. In short, each state may make it practically impossible for large corporations to maintain an office, or a place of business, or operate a plant within the borders of the state. But unless this power to control or exclude corporations is exercised in accordance with sound economic principles, all attempts to suppress and exclude will be futile. For instance, it would be difficult to conceive the mischief that would follow if each state provided, for instance, that no corporation should be organized with a capital in excess of \$100,000. The power of the state to so provide is beyond question, but the inconvenience that would be caused in the commercial and industrial world would be such that men would necessarily find some way to evade a law so diametrically opposed to economic conditions and tendencies.

If economic conditions are such as to demand corporations of large capitalization, and the consolidations, and the organization of corporate combinations, nothing is more certain than that such large organizations will come into being in some form or other. Courts and legislatures may — as they have so frequently done in the past — engage in a quixotic warfare with irresistible economic conditions and tendencies, and cause almost infinite trouble until they yield to forces they cannot control.

§ 655. Nothing inherently evil in combination.— There is nothing inherently evil in any form of combination the object of which is simply the legitimate advancement of the legitimate interests of those engaged in the combination.

There is nothing inherently evil in a combination the object of which is to raise wages or prices, or restrict competition, or control production, each of these several objects being recog-

nized by all men as not only lawful, but, economically speaking, laudable in the ordinary pursuits and occupations of life.

There being nothing inherently wrong in the combining of men together to advance their legitimate interests by lawful means, it follows — as has already been clearly shown — that the legality of any given combination, whether the combination be large or small, whether it consists of two or of many, depends entirely upon the objects of the combination and the means used to attain the objects. If there be nothing of a criminal, unlawful or oppressive character in either the objects or the means to be used to attain the objects, then the combination is legal whether it be small or large; if, however, the combination intends doing that which is criminal, unlawful or oppressive, either as an ultimate end or as a means to attain an end, then the combination amounts to a conspiracy and is unlawful, whether it be small or large.

§ 656. Right to combine is the right of the individual.— The use of the phrase “rights of capital” must not be permitted to mislead. The use of the word “capital” simply means the individuals who ordinarily employ, as distinguished from individuals who are ordinarily employed and who have been designated by the term “labor.” On both sides the right to combine is the right of the individual, and before the law the individual is considered and stands apart from any property he may own or force he may control. So far as the right to co-operate together is concerned, it is entirely immaterial whether a man does or does not possess property; it is entirely immaterial whether he employs or is employed. A labor union may have a very large fund at its command in its treasury, a fund larger than that possessed by many combinations of smaller capitalists, but the right of the members of the union to co-operate together and combine is not affected by the extent of their resources; the legality of the combination may often be ascertained from the uses to which those resources are put, but the right to combine is not affected in the slightest degree by the fact that a combination may degenerate into a conspiracy, or that many combinations are from their very inception conspiracies. Likewise, the resources of a combination of employers may be large or small, but it is difficult to see how the mere extent of the resources affects in the slightest degree the legal-

ity of the combination, though the uses to which the resources may be put frequently shows the character of the combination.

The right of men to co-operate together, to combine together for all lawful purposes, being an individual right, any attempt at discrimination among the different classes of the community in this respect is opposed to the fundamental principles of constitutional government; and all laws which attempt to curtail the rights of any particular class to combine together and at the same time extend the rights of some other class are of an unconstitutional character. The interpretation of constitutions lies within the province of the courts, and, unhappily, shifting notions of expediency frequently control. More powerful, however, than judicial decrees and constitutional provisions are the economic forces which sweep men on irresistibly. If, as seems unquestionably true, the economic conditions and tendencies of the day demand co-operation and combination on a large scale, all opposing statutes and all opposing decrees and judgments will prove futile for good and prolific of mischief.¹

¹ In saying that combinations have come to stay, the writer would not be understood as committing himself to the proposition that combinations in their present form will permanently remain among the factors of progress and civilization. All forms of co-operation are subject themselves to the laws of evolution. Combinations, whether partnerships, associations, corporations, or more complex forms of co-operation, contain elements of vitality exactly in proportion to their adaptability. At the present time the production of wealth is the chief end and aim of the civilized world. In the production of wealth, as in the pursuit of all material achievements, co-operation is absolutely essential, and as the pursuit of wealth becomes more intense and production attains a larger and grander scale co-operation necessarily becomes more complex. It is even conceivable that combinations and co-operation might so increase that ultimately many of the larger

industries might come under the control of a single combination and a form of communism be the logical result; for, even though the state should not assume control of any particular industry, it is quite apparent that, as an entire industry tends to fall within the control of a combination, the state will intervene directly or indirectly to control the combination in the exercise of its powers and privileges; so that in the end, while the immediate instrument might be a combination controlled in all practical details by individuals, the ultimate power would reside in the commonwealth. There is already perceptible a tendency on the part of the courts to hold that large combinations which practically control an industry are in some sense *quasi-public* corporations, and as such obliged to treat parties dependent upon them with some degree of equality.

It would require a far look ahead to predict what the outcome of pre-

ent tendencies will be, but nothing is more certain than that both courts and legislatures are absolutely powerless to alter the drift of evolution. Given a community with certain desires and ambitions, nothing is surer than that such a community will pursue its desires and ambitions along the lines of least resistance. So long as the civilized world is committed to the pursuit of material ends, co-operation on a large scale will continue to be adopted as one of the most effective means to attain the ends in view. When legislatures and courts by enactments and decrees can turn men aside from the pursuit of wealth, then, and only then, can they suppress the tendency toward combination.

It is to be hoped, however, that in the generations to come the present feverish pursuit of wealth will give way to satisfactions and pleasures of a more intellectual and æsthetic character. It is also to be hoped that the present demand for quantity instead of quality, for mechanical instead of artistic productions, will

subside. Already there are signs of a revival of interest in the various handicrafts; the products of machinery are no longer in high repute; the worth of the worker is beginning to be appreciated, and there is a demand for those products and creations which bear the mark of the tool and the stamp of individuality,—these are encouraging signs, and indicate a revival of art, of art in every occupation in life. The forms of co-operation possible under conditions wherein the individuality of the worker is appreciated would be essentially different from the forms of co-operation possible under conditions wherein the identity of the worker is lost and all individuality absorbed by more or less automatic machinery. But whatever the stage of civilization, those forms of co-operation best fitted to attain the ends and aims of the age will surely be adopted; for after all co-operation is but a part, though a most essential part, of that division of labor which prevails in every progressive community.

